## Indictment (C80-944)

10 *In the District Court of the United States for the Southern District of New York*

Southern District of New York, ss: The grand jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, on or about August 12, 1929, at the Southern District of New York and within the jurisdiction of this Court, William Frad,
11 alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly did, when reentering the United States, use or attempt to use a passport of the United States, to wit, Passport #530957, which was issued on or about April 10, 1928, in consequence of a false statement made by the said defendant in an application therefor, dated on or about April 16, 1928, to wit, that in said application, and in and about the making thereof, the said defendant concealed his true identity, and falsely represented himself to be "Fred Warren Gorham," against the peace of the
12 United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (40 Stat. 227, June 15, 1917, C. 30, Title IX, Section 2, U. S. C. C.; Title 22, Section 220, U. S. C.).

### SECOND COUNT

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit,

on or about August 12, 1929, at the Southern District of New York and within the jurisdiction of this Court, William Frad, alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly did, when re-entering the United States, use or attempt to use a passport of the United States, to wit, Passport #530957, issued on or about April 18, 1928, which was issued and designed for the use of another than himself, to wit one Fred Warren Gorham, whose identity is to the grand jurors unknown, that is to say, that the said defendant when reentering the United States, as aforesaid, falsely stated to the immigrant inspector that he was the aforesaid Fred Warren Gorham, and did thereupon present the said passport; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (40 Stat. 227, June 15, 191 c. 30, Title IX, Section 3, U. S. C. C.; Title 22, Section 221, U. S. C.).

## THIRD COUNT

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, on or about April 30, 1930, at the Southern District of New York and within the jurisdiction of this Court, William Frad, alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly did, when reentering the United States, use or attempt to use a passport of the United States, to wit, Passport #167, which was issued on or about April 15, 1930, in

consequence of a false statement made by the said
16 defendant in an application therefor, dated on or about April 15, 1930, to wit, that in said application and in and about the making thereof the said defendant concealed his true identity and falsely represented himself to be "Fred Warren Gorham"; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (40 Stat. 227, June 15, 1917, c. 30, Title IX, Section 2, U. S. C. C.; Title 22, Section 220, U. S. C.).

17 FOURTH COUNT

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, on or about April 30, 1930, at the Southern District of New York and within the jurisdiction of this Court, William Frad, alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly, did, when reentering the United States, use or attempt to use a passport of the United States, to wit, Passport #167, issued on or about April 15, 1930, which was
18 issued and designed for the use of another than himself, to wit, one Fred Warren Gorham, whose identity is to the grand jurors unknown, that is to say, that the said defendant when reentering the United States, as aforesaid, falsely stated to the immigrant inspector that he was the aforesaid Fred Warren Gorham, and did thereupon present the said passport; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case

made and provided. (40 Stat. 227, June 15, 1917, c. 30, Title IX, Section 3, U. S. C. C.; Title 22, Section 221, U. S. C.).

## FIFTH COUNT

And the grand jurors aforesaid, on their oath aforesaid, do further present that heretofore, to wit, on or about April 15, 1930, William Frad, alias "Wm. D. Frad," alias "Fred Warren Gorham," the defendant herein, unlawfully, wilfully and knowingly, at the American Consulate at Nice, France, in and about the making of an application for a passport of the United States, to wit, Passport #167 and with intent to induce or secure the issuance of said passport under the authority of the United States, for his own use, did falsely conceal his true identity and did falsely represent himself to be "Fred Warren Gorham," contrary to the laws regulating the issuance of passports and the rules prescribed pursuant to such laws; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (40 Stat. 227, June 15, 1917, c. 30, Title IX, Section 2, U. S. C. C.; Title 22, Section 220, U. S. C., 36 Stat. 1100, R. S. Sec. 730, Mar. 3, 1911, c. 231, Sec. 41, U. S. C. C.; Title 28 Sec. 102 U. S. C.).

GEORGE Z. MEDALIE,
United States Attorney.

## Endorsements on Indictment (C-80-944)

22

FEB 6-1934 *Pleads Not Guilty*
Filed in open Court, the
MAR 21 1934 Before Inch. J.
Deft pleads guilty
Sentence adjourned to Mar 26, 1934.
Bail Cont'd
MAR 26 1934

Imposition of sentence suspended. Probation for 4 years, to begin after serving sentence on C 96-116

23 SUBJECT TO THE STANDING PROBATION ORDER OF THIS COURT.

Inch, J,

S

C 80-944

U. S. DISTRICT COURT

THE UNITED STATES OF AMERICA

*vs.*

24 WILLIAM FRAD, alias "Wm. D. Frad", alias "Fred Warren Gorham"
see 96-120
" 96-116.

INDICTMENT

Using a passport designed for one other than the defendant and obtained in consequence of a false statement; and making a false statement in an application therefore.

Title 22, Sec. 221, Sec. 220; Title 28, Sec. 102 U. S. C.

GEORGE Z. MEDALIE,
*U. S. Attorney.*

A TRUE BILL

LOUIS CASTAYNETTA,
*Foreman.*

JUN 16 1931

SAMUEL C. BAUM
*Secy.*

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## Indictment (C-96-116)

*In the District Court of the United States of America for the Southern District of New York*

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, beginning on or about April 16, 1928, and continuing on each and every day thereafter down to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, and divers other persons not named herein as defendants, whose true names are to

the grand jurors unknown, unlawfully, wilfully
28 and knowingly did combine, conspire, confederate and agree together and with each other to commit an offense against the United States. to wit, to violate Section 220 of Title 22, United States Code, in that the said defendant did unlawfully, wilfully and knowingly conspire with two of the unknown persons using the names Albert H. Gorham and Harry J. Wilson to make false statements in applications for passports with intent to induce and secure the issuance thereof under the authority of the United States for the use of said
29 defendant and other persons to the grand jurors unknown, contrary to Sections 211 and 227 of Title 22, United States Code, as amended, regulating the issuance and use of passports and the rules prescribed by the Secretary of State of the United States pursuant to such laws, and to use said passports so obtained by reason of the aforesaid false statements; and that the defendant did do acts in the Southern District of New York and within the jurisdiction of this Court to effect the object of the conspiracy.

It was part of said conspiracy that said defendant
30 William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, was to procure for his own use a passport issued by the United States by means of false oral representations and by means of false statements contained in an application for said passport, to an agent of the Department of State of the United States.

It was further a part of said conspiracy that

said defendant William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, 31
alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, would submit with his application for American passport, to said agent of the Department of State of the United States, an affidavit of birth subscribed and sworn to by a person professing to be Albert H. Gorham, said affidavit stating that said Albert H. Gorham had known the applicant, said defendant William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias 32
Edward Daniel Swift, alias Frederick L. Price, for forty-seven years, and that said affiant Albert H. Gorham was a brother of said applicant.

It was further a part of said conspiracy that said defendant William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, would submit an application for a passport of the United States, and that a person professing to be Harry J. Wilson would make an affidavit in behalf of the application of said defendant, as an 33
identifying witness, stating that he had known the applicant for five years. and that the statements made to the agent of the Department of State by said defendant William Frad, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, under the name of Fred Gorham, were to the best of his knowledge and belief true.

34 It was further a part of said conspiracy that said defendant WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, would make an affidavit of birth under the name of Frederick L. Price, in behalf of a Charles William Davis in order that said Davis might obtain a passport of the United States for the use of said Charles William Davis.

35 It was further a part of said conspiracy that said defendant WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, was to use the passport thus secured by reason of false statements, as aforesaid, to make numerous and divers trips on the various transatlantic vessels with said Charles William Davis and divers other persons, to obtain money and property and other things of value from divers and sundry passengers by means of false and fraudulent pretenses and representations and other unlawful and dishonest means.

36

OVERT ACTS

1. In furtherance of said conspiracy and to effect the objects thereof, on or about May 2, 1931, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick

*Endorsements on Indictment (C96-116)*

L. Price, did purchase a ticket for passage on the S. S. "Europa". 37

2. And further in pursuance of said conspiracy and to effect the objects thereof, on or about June 2, 1931, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, *did present a* passport of the United States, to wit, Passport No. 167, to an officer of the United States Government. 38

Against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 88, Title 18, United States Code.)

MARTIN CONBOY,
United States Attorney.

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**Endorsements on Indictment (C96-116)**

FEB 28 1934 *Pleads Not Guilty* 39
Bail in Indict C 80-944
Filed in open Court, the
to cover this Indictment JJ

MAR 21 1934 Before Inch J.

Deft pleads guilty
Sentence adjd to
Mar 26, 1934. Bail Contd

*Endorsements on Indictment (C96-116)*

MAR 26 1934, the Defendant
40 Sentenced to—2 years, and fined $1,000. Deft. to stand committed until fine is paid or he is otherwise discharged by law.

Place of confinement to be designated by the Atty General.

Inch, J. JJ

May 9th 1934
Paid $449.15 on Account
May 23rd 1934
Paid $550.85 balance

all paid
41 RB

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96-116

#34035
S

U. S. DISTRICT COURT

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THE UNITED STATES OF AMERICA

*vs.*

42

WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price

See C 96-120
" C 80-944

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INDICTMENT

Conspiracy to obtain and use a passport, the issuance of which was secured by reason of false statements.

Section 88, Title 18 U. S. C.

MARTIN CONBOY
*U. S. Attorney.*

A TRUE BILL

C. DOUGLASS GREEN
*Foreman.*

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**Indictment (C96-120)**

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

FOR THE SOUTHERN DISTRICT OF NEW YORK

Southern District of New York, ss: The Grand Jurors for the United States of America, duly empaneled and sworn in the District Court of the United States for the Southern District of New York, and inquiring for that district, upon their oath present:

That heretofore, to wit, on or about the 6th day of September, 1932, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred

Warren Gorham, alias Fred Gorham, alias Ed-
46 ward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, wilfully and knowingly, when applying for admission to the United States, did personate another, that is to say, one Daniel Edward Swift, and that the defendant did then and there for the purpose aforesaid present a passport, number 10097, originally issued by the Dominion of Canada on or about July 28, 1931 to Daniel Edward Swift, and represented himself to be the said Daniel Edward Swift; against the peace of the
47 United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 22, Subdivision (b), Immigration Act of 1924), (Section 220 of Title 8, U. S. C.)

SECOND COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 23rd day of May, 1933, at the Southern District of New York and within the jurisdic-
48 tion of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, wilfully and knowingly, when applying for admission to the United States, did personate another, that is to say, one Daniel Edward Swift, and that the defendant did then and there for the purpose aforesaid present a passport, number 10097, originally issued by the

Dominion of Canada on or about July 28, 1931 to Daniel Edward Swift, and represented himself to be the said Daniel Edward Swift; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 22, Subdivision (b), Immigration Act of 1924), (Section 220 of Title 8, U. S. C.)

THIRD COUNT

And the grand jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 3rd day of October, 1933, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, wilfully and knowingly, when applying for admission to the United States, did personate another, that is to say, one Daniel Edward Swift, and that the defendant did then and there for the purpose aforesaid present a passport, number 10097, originally issued by the Dominion of Canada on or about July 28, 1931 to Daniel Edward Swift, and represented himself to be the said Daniel Edward Swift; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 22, Subdivision (b), Immigration Act of 1924), (Section 220 of Title 8, U. S. C.)

FOURTH COUNT

52

And the grand jurors aforesaid, upon their oath aforesaid, do further present that heretofore, to wit, on or about the 27th day of October, 1933, at the Southern District of New York and within the jurisdiction of this Court, WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price, the defendant herein, wilfully and knowingly, when applying for admission to the United
53 States, did personate another, that is to say, one Daniel Edward Swift, and that the defendant did then and there for the purpose aforesaid present a passport, number 10097, originally issued by the Dominion of Canada on or about July 28, 1931 to Daniel Edward Swift, and represented himself to be the said Daniel Edward Swift; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided. (Section 22, Subdivision (b), Immigration Act of 1924), (Section 220 of Title 8, U. S. C.)

54

MARTIN CONBOY,
United States Attorney.

## Endorsements on Indictment (C96-120)

MAR 7 1934 *Pleads Not Guilty* 55
Bail to be re-written to cover this Indict. (See C 80/944 & 96/116)
JJ

MAR 21 1934 Before Inch J.
Deft. pleads guilty
Sentence adjourned to Mar 26, 1934
Bail Cont'd

MAR 26 1934
Imposition of sentence suspended.
Probation for 4 years, to begin after serving sentence on C 96-116 56

SUBJECT TO THE STANDING PROBATION ORDER OF THIS COURT.

JJ

Inch, J.

NOV 21 1936

appearing same
Deft arraigned for violation of probation.
*Pleads Not Guilty* to violation of probation 57
Bail $5000. Remanded.

Goddard J.
S

DEC 4-1936
Deft. surrendered by his attorney.
Remanded.

Bondy, J. JJ

*Endorsements on Indictment (96-120)*

C 96/120

58

U. S. DISTRICT COURT

THE UNITED STATES OF AMERICA

*vs.*

WILLIAM FRAD, alias W. D. Frad, alias Fred Warren Gorham, alias Fred Gorham, alias Edward Swift, alias Daniel Edward Swift, alias Edward Daniel Swift, alias Frederick L. Price

59

See 96-116
" 80-944

INDICTMENT

Personating another when applying for admission to the United States.
Section 22, Subdivision (b), Immigration Act of 1922. Sec. 220 of Title U. S. C.

60

MARTIN CONBOY
*U. S. Attorney.*

A TRUE BILL

C. DOUGLASS GREEN
*Foreman.*

## Minutes of Proceeding before Hon. Robert A. Inch on March 21, 1934

61

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>*vs.*<br><br>WILLIAM FRAD, alias Wiliam D. Frad, alias Fred Warren Gorham (and other aliases). | C-80-944<br>C-96-116<br>C-96-120 |

62

Before:

HON. ROBERT A. INCH,
*District Judge, and a Jury.*

*New York, March 21, 1934.*

Appearances:

MARTIN CONBOY, Esq., United States Attorney, for the Government; 63

J. F. Dailey, Esq.,
F. W. H. Adams, Esq., and
Curtis C. Shears, Esq.,
Assistant U. S. Attorneys,
*of Counsel.*

MOSES POLAKOFF, Esq.,
Attorney for Defendant.

*Minutes of Proceeding before Hon. Robert A. Inch on March 21, 1934*

64 Mr. Dailey: The defendant pleads guilty.
Mr. Polakoff: To three indictments.
The Court: I can continue the bail?
Mr. Polakoff: He is under $3,000 bail.

(The clerk takes the plea of guilty of the defendant as to the three indictments.)

Mr. Polakoff: Will your Honor defer sentence until Monday?

The Court: I will continue him on bail. There is no objection?

65 Mr. Dailey: No.

The Court: Yes, Monday at 10:30. In the meantime I would like to see Mr. Polakoff and representatives of the United States Court in regard to any information that they want to bring to me about the sentence.

Mr. Polakoff: Monday morning?

The Court: Yes, come back Monday.

66

## Conditions of Probation

DISTRICT COURT OF THE UNITED STATES 73

SOUTHERN DISTRICT OF NEW YORK

To—William Frad . Docket No.—C96-120

(Address)—25 Central Park West, N. Y. C.

In accordance with authority conferred by the United States Probation Law, you have been probationed on this date, 3/26/34, for a period of 4 yrs. by the Hon. Robert A. Inch, United States District Judge, sitting in and for this District Court at New York City. 74

It is the order of the Court that you shall comply with the following general and special conditions of probation. The general conditions are as follows: (a) Refrain from the violation of any State and Federal penal laws. (b) Live a clean, honest and temperate life. (c) Keep good company and good hours. (d) Keep away from all undesirable places. (e) Work regularly. When out of work, notify your Probation Officer at once. (f) Do not leave or remain away from the city or town where you reside without permission of the Probation Officer. Notify your Probation Officer at once if you intend to change your address. (g) Contribute regularly to the support of those for whose support you are legally responsible. (h) Follow the Probation Officer's instructions and advice. The Probation Law gives him authority to instruct and advise you regarding your recreational and social activities. (i) Report promptly on the dates set forth. If for any unavoidable reason you are 75

*Conditions of Probation*

unable to do so, communicate with your Probation
76 Officer without delay.

The special conditions ordered by the Court are as follows:

(STAMP—Subject to the standing probation order of this court.)

Probation to commence at expiration of prison sentence.

You are hereby advised that under the law the Court may at any time revoke or modify any con-
77 dition of this probation or change the period of probation. If the Court sees fit, it may discharge you from probation at any time from further supervision, or it may extend your period of probation. You shall be subject to arrest, for cause, upon order of the Court, or without order, for cause, by the Probation Officer. At any time within the period of your probation, or within the maximum period for which you might originally have been sentenced for the offense for which you were convicted, the Court may, if it sees fit, for cause, impose the sentence which it might have imposed in the first in-
78 stance.

The Court has placed you on probation, believing that if you sincerely endeavor to obey and live up to the conditions of your probation, your attitude and conduct will improve both to the benefit of the United States and to yourself.

You will report as follows: Weekly at Probation Office.

(Signed)—Wm. D. Frad — *Probationer*

Elbert H. Williams — *Probation Officer*

Nov. 15, 1935

## Notice of Motion for Order of Judge Inch, Dated December 16, 1935

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| THE UNITED STATES OF AMERICA, —*against*— WILLIAM FRAD, | Indictments Nos. C-96-116 C-80-944 C-96-120 |

SIR:

PLEASE TAKE NOTICE that on December 16, 1935 at 10:30 in the forenoon of that day in the United States District Court, for the Eastern District of New York, at the Federal Building, Brooklyn, New York, an application for the within order to discharge William Frad from probation and from further supervision and to terminate the proceedings against him in this case will be made to the Honorable Robert A. Inch, United States District Judge of the Eastern District of New York.

Dated, New York, December 13th, 1935.

Yours, etc.,

LOUIS KARASIK,
Attorney for Petitioner,
Office & P. O. Address,
50 East 42nd Street,
Borough of Manhattan,
City of New York.

To:

HON. E. FRED SWEET,
Chief Probation Officer,
Southern District of New York,

Off At Bottom

## Order of Judge Inch, Dated December 16, 1935

82

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| THE UNITED STATES OF AMERICA,<br>*—against—*<br>WILLIAM FRAD, | Indictments Nos.<br>C-96-116<br>C-80-944<br>C-96-120 |

83

An order having been made and filed herein on or about the 26th day of March, 1934, by the Honorable Robert A. Inch, then duly assigned to a criminal term in and for the Southern District of New York and by which the defendant was in addition to a sentence and fine, placed on probation for a period of four years to begin after service of the sentence in accordance with the act of Congress approved March 4, 1925, entitled "An act to provide
84 for the establishment of a probation system in the United States except in the District of Columbia" and Acts amending this provision and the defendant William Frad having applied to the Court on the 16th day of December, 1935, for an order to discharge him from probation and from further supervision and that the proceedings against him in this cause be terminated and the defendant having submitted his petition wherein it appears that he is suffering from angina pectoris and that the

probationery status has produced a mental condition which fact is further attested by Dr. Rieder of 85
the New York Bellevue Medical School, and due notice having been given to the Honorable E. Fred Sweet, Probation Officer for the Southern District of New York, and due deliberation having been had thereon, it is

ORDERED, that the order of probation made herein *on the* 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him 86
in this cause be, and the same are hereby terminated.

Dated, New York City, December 16, 1935.

ROBERT A. INCH,
*U. S. D. J.*

87

## Complaint of W. J. McNulty, Dated November 19, 1936

88

Approved:

CURTIS C. SHEARS,
*Assistant United States Attorney.*

Before:

HONORABLE GARRET W. COTTER,
*United States Commissioner for the Southern District of New York.*

89

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*—against—*<br>WILLIAM D. FRAD, alias Edward Swift, alias Fred W. Gorham, W. WILLIS DAY and SAMUEL J. KOVEN,<br>Defendants. | COMPLAINT: Larceny on the High Seas—Violation of Sec. 287, U.S.C.C. |

90 Southern District of New York, *ss.*:

W. J. McNULTY, being duly sworn, deposes and says that he is a Special Agent in the Federal Bureau of Investigation, Department of Justice and upon information and belief alleges as follows:

That heretofore, to wit, on or about the eighth day of November, 1936, upon the S/S Santa Rosa of the Grace Line, said vessel at the time aforesaid

being operated by the Grace Steamship Company, 91
a corporation existing and by virtue of the Laws of the State of New York, and while said vessel was on the high seas and within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, the above named defendants did take and carry away with intent to steal and purloin certain personal property belonging to Paul K. Richter, of New York, N. Y., exceeding in value Thirty Thousand ($30,000.) Dollars; against the peace of the United States and their dignity and contrary to 92
the form of the statute of the United States in such case made and provided.

The sources of deponent's information and the grounds of his belief are investigations made by him in the course of his official duties.

That the above defendants are to be found in the Southern District of New York and within the jurisdiction of this Court.

WHEREFORE, deponent prays that a warrant may issue for the apprehension of the above named defendant and that he may be imprisoned or bailed 93
as the case may be.

W. J. McNULTY.

Sworn to before me this
19th day of November, 1936.

(signed) GARRET W. COTTER,
United States Commissioner,
Southern District of New York.

**Order for Issuance of Warrant to Apprehend Probationer, Dated November 20, 1936.**

94

DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*vs.*<br>WILLIAM FRAD,<br>Defendant. | Docket No.<br>C-96-120 |

95

Order fo Issuance of a Warrant to Apprehend Probationer.

*It appearing to the* said Court that on March 26th, 1934, this Court suspended sentence on the above-named Defendant and placed him on probation pursuant to the Act of March 4, 1925, and that the above-named Defendant has violated one of the terms of his probation, that is: he has committed larceny by trick on the high seas.

96

NOW, THEREFORE, It is ordered that a warrant issue for the arrest of said probationer William Frad.

Dated, New York City, November 20, 1936.

FRANCIS G. CAFFEY,
Judge of U. S. District Court.

**Petition for Revocation of Probation and Resentence, Dated November 20, 1936.**

97

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

*vs.*

WILLIAM FRAD,

**Defendant.**

C-96-120

98

*To the Honorable Francis Caffey, Judge of the District Court of the United States for the Southern District of New York:*

The petition of E. Fred Sweet, Chief Probation Officer for the District Court of the United States for the Southern District of New York, respectfully shows to this Court:

that on March 26th, 1934, the herein named Defendant was placed on probation for 4 years to follow a penitentiary sentence of 2 years on indictment 96-116, said probation sentence being for violation of the Immigration Act of 1922

99

that he has again returned to his criminal profession of card sharper on the high seas

100 that he has associated with persons of ill repute

Your petitioner's information and belief are based upon a complaint filed on November 19th, 1936, by Assistant United States Attorney Curtis C. Shears, and investigations of the Federal Bureau of Investigation. Your petitioner therefore respectfully requests that the probation of the said probationer William Frad be revoked, and that a warrant issue for his arrest, and that this petition be
101 granted.

Dated, New York, November 20, 1936.

E. FRED SWEET,
Petitioner.

E. FRED SWEET, being duly sworn, deposes and says that he is the petitioner herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that
102 as to those matters he believes them to be true.

E. FRED SWEET

Sworn to before me this
20th day of November, 1936.

(NOTARIAL SEAL)

FLORENCE SWEET,

Florence Sweet,
Notary Public, New York County No. 648
Commission Expires March 30, 1938.

## Notice of Motion to Vacate Order

UNITED STATES DISTRICT COURT 103

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, —*against*— WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham, Defendant. | C-80-944 C-96-120 |

104

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Curtis Charles Shears, Assistant United States Attorney, verified the 1st day of December, 1936, and upon all the proceedings heretofore had in this action, the undersigned will move this Court in Room 318 of the United States Court House, Foley Square, New York, on the 8th day of December, 1936, at 10:30 in the forenoon or as soon thereafter as counsel may be heard to set aside an order 105 entered in this cause on the 16th of December, 1935, signed by Honorable Robert A. Inch, United States Judge for the Eastern District of New York, and for such other, further and different relief as to the Court may seem just and proper.

*Notice of Motion to Vacate Order*

Dated: New York, N. Y., December 2nd, 1936.

106

LAMAR HARDY,
United States Attorney,
Southern District of New York,
Attorney for Plaintiff,
Office & P. O. Address:
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

TO:

107 LOUIS KARASIK, Esq.,
50 East 42nd Street,
New York City.

108

## Affidavit of Curtis Charles Shears of December 1, 1936

109

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*—against—*<br>WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham,<br>Defendant. | C-80-944<br>C-96-120 |

110

State of New York,
County of New York,
Southern District of New York, *ss.*:

CURTIS CHARLES SHEARS, *being duly sworn, deposes and says* that he is an Assistant United States Attorney for the Southern District of New York in charge of the above mentioned cases.

That on June 16, 1931, an indictment was filed, C-80-944, charging above defendant with violations 111
of Sections 220 and 221, Title 22 of the United States Code, and Section 102, Title 28 of the United States Code, on February 27, 1934, indictment C 96-116 was filed, charging violations of Section 88, Title 18, United States Code, and on March 2, 1934, indictment C 96-120 was filed, charging violations of Section 220, Title 8, United States Code, and Section 22, subdivision (b) of the Immigration Act of 1922.

On the 26th day of March, 1934, the day of trial, defendant pleaded guilty to all three indictments

112 before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting at a term of Court in and for the Southern District of New York. Judge Inch sentenced the defendant on indictment C 96-116 to two years imprisonment and to pay a fine of $1000, for which he was to stand committed until the fine was paid. On indictments C 80-944 and C 96-120 Judge Inch suspended the imposition of sentence and placed defendant on probation for four years, to begin after defendant had served the sentence on C-96-116.

113 Pursuant to the aforesaid sentence, defendant was confined in the United States Northeastern Penitentiary, Lewisburg, for the term of two years, less allowance for good behavior, and paid the aforesaid fine. On November 2, 1935, petitioner was discharged from the aforesaid penitentiary.

On December 16, 1935, after three day notice to the chief probation officer for the Southern District of New York, a hearing was held before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting in the
114 Eastern District of New York at the Federal Building, Brooklyn, New York, on an application for an order to discharge defendant from probation and from further supervision and to terminate the proceedings against him in this case. An order was submitted with the notice of motion to the following effect:

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is

discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated." 115

This order was signed by Judge Inch on December 16, 1935.

*This order was intended* to discontinue probation supervision and no more. Any provision to terminate other proceedings in this cause is illegal.

WHEREFORE, deponent prays that so much of the order of December 16, 1935 that purports to do more than discharge the defendant from probation supervision be set aside and a new order entered in this cause and for such other, further and different relief as to the Court may seem just and proper. 116

CURTIS CHARLES SHEARS.

Sworn to before me this
1 day of December, 1936.

LEO COHEN,
Notary Public,
N. Y. Co. Clks. No. 156, Reg. No. 8C169,
Bronx Co. Clks. 13 Kings Co. Clks. 131,
Commission expires March 30, 1938. 117

**Notice to Relator**

118 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

C. M. S. 11-25-36

| | |
|---|---|
| THE UNITED STATES OF AMERICA, *vs.* WILLIAM FRAD, | INDICTMENT C-96-120 C-80-944 |

119

To Mr. William Frad,
No. 25 Central Park West,

I have to inform you that the indictment against you will be moved for sentence at the District Court of the United States for the Southern District of New York, to be held in Room 318, at the United States Court House, Foley Square, in the City of New York, on Tuesday the 8th day of December
120 instant, at 10.15 o'clock in the forenoon.

If you fail to appear at that time your bond will be forfeited.

LAMAR HARDY,
*United States Attorney.*

Dated, Dec. 3, 1936.

## Notice to Surety

DISTRICT COURT OF THE UNITED STATES 121

SOUTHERN DISTRICT OF NEW YORK

C. M. S. 11-25-36

| | |
|---|---|
| THE UNITED STATES OF AMERICA, | INDICTMENT C-96-120 C-80-944 |
| *vs.* | |
| WILLIAM FRAD, 122 | |

To U. S. Fidelity & Guaranty Co.
No. 75 William Street,

I have to inform you that the indictment against the above-named defendant, for whose appearance you are bound, will be moved for Sentence, at the District Court of the United States for the Southern District of New York, to be held in Room 318, at the United States Court House, Foley Square, in the City of New York, on Tuesday the 8th day of December instant, at 10.15 o'clock in the forenoon. 123

If the defendant is not produced at that time your bond will be forfeited.

LAMAR HARDY,
*United States Attorney.*

Dec. 3, 1936.

## Hearing in Resettlement, December 8, 1936

124

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>*vs.*<br><br>WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham, | C-80-944<br>C-96-120 |

125

Before:

HON. ROBERT A. INCH,
*District Judge.*

New York, December 8th, 1936;
11.30 o'clock a. m.

Appearances:

126

LAMAR HARDY, ESQ., United States Attorney, for the Government;
Curtis C. Shears, Esq., Assistant U. S. Attorney, of Counsel.

LOUIS KARASIK, ESQ., and
JOSEPH G. M. BROWNE, ESQ.,
Attorneys for Defendant.

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Mr. Shears: Your Honor, this is on a notice of motion to vacate an order made by your Honor on December 16, 1935. The Government's motion

papers are passed up. Are there any answering papers? 127

Mr. Browne: No. Your Honor, at this time I want to say that I think the practical thing to do is to have your Honor hold this matter in abeyance pending the final determination of a writ of habeas corpus which we have sued out and which is pending before Judge Bondy, in which we are attacking the jurisdiction and the validity of the order which was made by his Honor, Judge Caffey, directing that a warrant issue for the apprehension and arrest of the defendant for an alleged violation of the probation order which was originally made by your Honor back in 1934 and which was subsequently revoked by your Honor, on due application and hearing, and under which order your Honor discharged the defendant from the terms of the probation order, discharging him from further supervision thereunder and terminating the proceedings, and our contention in the application for the writ is that with that order which your Honor made on December 16, 1935, revoking the probation order, terminating probation, relieving the defendant of the supervision and terminating the proceedings, those causes and all proceedings thereunder were finally terminated and at an end. That is the matter we are going to argue out before his Honor Judge Bondy. If we are successful upon that writ, then immediately this proceeding becomes academic, so I offer the suggestion to the Court that this matter be held in abeyance pending the final outcome of the habeas corpus proceeding. 128 129

The Court: What do you say, Mr. Shears?

Mr. Shears: Your Honor, in that behalf, inasmuch as your order of December 16, 1935, is de-

pended upon by counsel in his writ of habeas corpus,
130 it becomes very vital for your Honor to decide what your Honor's intention was at the time of signing that order.

If it was your Honor's intention to modify the sentence that your Honor imposed on March 26, 1934, *then* the Government contends that your action in the Eastern District of New York is *illegal and void. If it* was your Honor's intention at that time, as the Government contends, merely to terminate probation supervision and to discontinue the probationer from reporting to the
131 probation officer, then, of course, we would like to have your Honor's action on that and in such way modify your Honor's order of December 16, 1935, as to make that clear, so that that will not be an issue in the habeas corpus proceedings, which will be heard later on this month.

The Court: Well, all I did was, that Mr. Karasik brought over this man Frad and said that he wanted to be relieved of the probation, that he had served his term in jail, and I was kind of humorous about it, I told him that I did not think that—Mr. Frad will remember that—I did not think that I could
132 reform him if he did not intend to reform at his age, and that I trusted that we would not have any further trouble about the thing. So I was relieving him of probation. I don't know anything more than that.

Mr. Browne: If the Court please, under the terms of the order and according to our contention of the construction and interpretation of the Probation Act, supported by adequate authority, when a probationer has served his time of probation or when he has been relieved of further compliance

therewith, it is tantamount to the Court fixing a definite time when it relieves him therefrom and 133
terminates the proceedings, and our contention is that that jurisdiction of the matter is at an end, not only insofar as your Honor's power to take any further action thereunder is concerned but *insofar* as the general power or jurisdiction of the Court or any judge thereof is concerned.

*Our contention is that it* has the same effect as if the man had served a sentence.

Now, that is the question before the Court on the habeas corpus proceeding.

I might say that I have been unable to find, from a very intensive research of the law, any ruling in 134
this circuit on that point, and in other circuits and other districts the situation, that is the factual situation, was not the same as it is in the case at bar, in this sense, that in every one of the reported cases where the test was made there had been an actual imposition of a sentence but the execution of the sentence was suspended pending the probation period, and in those cases the question arose whether, if he had violated the terms of the probation during the probation period, there could be no question of the Court's right to re-sentence him. Where the term of probation had expired the ques- 135
tion arose whether the Court then had power to recall him although he had at no time during the probationary period violated the order but had complied therewith. Some of the courts have held that the court still has the power to recall him insofar as the maximum period for which the original sentence might have been imposed has not expired, but they have pointed out, and that is our theory, that where there has never been a

sentence imposed but the imposition of sentence
136 has been suspended, as your Honor did in this case, then if he complies with the terms of the probation order or is excused therefrom, the effect of that, then, is to definitely, legally terminate the proceedings so that the Court has no jurisdiction to re-sentence or vacate the suspension of execution of sentence, but the point is that sentence has not been imposed so he cannot be sentenced, or rather re-sentenced or sentenced if imposition of sentence was suspended and he complied with the terms of the probation order and was then relieved
137 therefrom.

Of course, we have no concretely reported cases on the point where that distinction has been brought. This is a virgin case. The question of the power of the Court under a situation of this kind, so far as my search goes, and I have made a very thorough and intensive research, I do not find that it has ever been the subject of a judicial ruling in any district or by the Circuit Court of Appeals of any Circuit.

The Court: That may be, Mr. Browne, but the point is first to fix my order right, that is all. Now,
138 the order, according to the United States Attorney, goes too far. It not only accomplishes what we thought we were accomplishing, but it entirely terminates the proceeding. It wasn't before me to terminate the proceeding.

Mr. Browne: But I thought—

The Court: Only to take this man off the roll of supervisory probation.

Mr. Browne: Well, if your Honor pleases, even so, our contention is that that is the legal effect of that decision.

The Court: Yes.

Mr. Browne: And I urge this point at this 139
time,—

The Court: Well, I don't care about the effect; I am only talking now about the form of the order.

Mr. Browne: Well, it seems to me—

The Court: You can argue that if I say to a man, you have served two years in jail and now you face *this supervisory* situation, and I agree with you that that may be irksome, that you may want to leave the jurisdiction and that you may have to write once a month and all that kind of thing, I don't know whether you are going to 140
be a good man or bad man, but at your age I can't do anything, I think, to rehabilitate you if you are not willing to do it yourself, consequently I relieve you from that supervisory power or probation. Now, that is all we intended to do. I did not go into the merits of deciding any other rights or merits. That you can argue. I don't know what would be the effect of it.

Mr. Browne: That is all your Honor's order did; all you did under the terms of that order.

The Court: Well, my order, they say, went further than that; it went not only to relieving him 141
of the probationary supervision, but it also terminated the proceeding, which I had no right to do, never intended to do.

Mr. Browne: No, that is not what your Honor said. Your order follows the language of Section 725 in Title 18 of the United States Code.

The Court: I am merely saying what I take from Mr. Shears' statement.

Mr. Browne: No, that is all your Honor's order does. If you will compare the language of the

order with the language of Section 725 of Title 18
142 of the United States Code, you will find that that is what it does. I have the Code here, your Honor, and I will read you the provision and you will find that your order follows that.

There is another point that I want to urge at this time, your Honor, and that is the question of jurisdiction, the question of term time, as to whether your Honor has power at this time to change the order after the term of the Court has expired. While I only press that as a sort of a supplementary—

The Court: You came over in the Eastern Dis-
143 trict getting that jurisdiction; it doesn't lie very well in your mouth to say now that I can't make the order.

Mr. Browne: I don't mean it in that sense at all. I urge it as a supplementary proposition to preclude the United States Attorney from jeopardizing any rights that we may have by virtue of our habeas corpus proceeding.

Now, your Honor, this Section under which you made this order, and your order follows substantially this, literally, the language of the section
144 reads as follows: "When directed by the Court the probation officer shall report to the Court with a statement of the conduct of the probationer while on probation. The Court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him or may extend the probation, as shall seem advisable. At any time within the probation period the probation officer may arrest the probationer without a warrant or the Court may issue a warrant for his arrest. Thereupon such probationer shall forthwith

be taken before the Court. At any time after the probation period but within the maximum period 145
for which the defendant might originally have been sentenced, the Court may issue a warrant and cause the defendant to be arrested and brought before the Court. Thereupon the Court may revoke the probation or the suspension of sentence and may impose any sentence which might originally have been imposed."

Now, that first paragraph, your Honor, is what your order refers to, and substantially follows this language: "The court may thereupon discharge the probationer," which is what your order says it does. 146

The Court: Yes.

Mr. Browne: And "from further supervision." That is what your order says it does.

The Court: Yes.

Mr. Browne: "And may terminate the proceedings against him," which is just what your order says it does. That is all your Honor has done.

As to the legal effect of that, insofar as it definitely terminates the proceeding is concerned, the cases that I rely upon hold that when the courts take into consideration the history and the purpose and object of the Probation Act and the 147
theory of giving the probationer a chance to rehabilitate himself, that when he complies with the order of probation or is relieved therefrom, that thereupon he becomes absolutely immune from any further proceedings in the cause or, as one case which I have here puts it, "When the period of probation ends favorably there remains nothing of the procedure, not even the record of the offense committed," and as they say in another case, "This

148 statute combines the American System of probation with the European System of conditional sentence by using either form of disposition of the defendant and admitting the defendant to probation under either, resulting in each case, if the defendant proves himself worthy, in the final discharge of the prisoner without sentence or judgment."

That is our contention.

The Circuit Court of Appeals in another case says that if the probationer complies with the condition of his probation, he is entitled to a final discharge.

149 We say that when he complied with this order of probation made by your Honor and when you relieved him from further supervision thereunder and terminated this proceeding under the construction of the Probation Act, not necessarily as the language of your order reads, I mean, or what you intended to have done, we say the legal effect which follows that, as no courts have held yet, is to definitely terminate those proceedings just the same as if they had no longer existed, that the power and jurisdiction to further participate in them is at an end.

150 The Court: This was a separate indictment?

Mr. Karasik: Separate indictments, three separate indictments.

Mr. Browne: And three separate dispositions.

The Court: So that the recent decision of the Circuit Court of Appeals applies to only two counts in an indictment?

Mr. Karasik: That is exactly what I was going to point out, three separate indictments, and I also want to state at this time, if your Honor please, that the order of December 16th that your Honor signed relieving him from reporting was not signed by your Honor until after the probation officer in New

York was given notice and furthermore until after the probation officer in the Eastern District was 151
called in by your Honor and the entire matter discussed and the entire effect taken into consideration. In other words, this was not an order signed on the spur of the moment or handed in ex parte. *Your Honor first made me* report to the probation officer, Mr. Princeline in the Eastern District. Mr. Princeline then submitted a report to your Honor and then your Honor communicated and consented to listen to argument and I served notice on the probation officer in New York and we had argument in your chambers on that.

There are three separate and distinct indict- 152
ments. Your Honor imposed sentence of two years and a fine of $1000 on one indictment. The sentence was imposed, the fine was paid. The other two indictments your Honor suspended sentence. It differs from the case relied on, because in that case that they rely on it was different counts in one indictment. There are three separate indictments.

Mr. Browne: Your Honor, when this petition for writ of habeas corpus was drawn—I should like your Honor to glance at it for a moment and you will see that it was drawn with considerable and 153
distinct circumspection and with the Greenhouse case definitely in mind, distinguishing this case from the Greenhouse case where the court said that the sentencing court could not split up a sentence by imposing a term of imprisonment in regard to some counts and suspending sentence with regard to others, that there was only one element of conviction and it could not be divided into component parts.

As your Honor will observe from the allegations of this petition for the writ, we set forth that these were *three separate and distinct* indictments upon

which three separate and independent pleas were
154 entered and upon which three separate and independent sentences were made by the court. It is just the same as though it was an independent proceeding.

The Court: What strikes me is that if Mr. Frad was guilty of a crime, why didn't they prosecute him directly for that crime? Why should he be lugged in under this provision?

Mr. Browne: Well, your Honor, here is the situation—

Mr. Shears: May I answer that? I believe it is directed to the Government.

155 The Court: Yes.

Mr. Shears: Because the question is more or less of a governmental action.

The Court: Yes.

Mr. Shears: That may, of course, be an alternative of the Government. However, it is customary under these violations of the law that if a man is out on probation—and the Government contends that a man's probation never expires regardless of your Honor's order until the maximum term of sentence under which he could have been sentenced expires. Now, the Government in this case
156 is proceeding under probation violation through the probation officer's office, inasmuch as that is the prescribed method by which a probationer is returned for sentence in case he violates the terms of his probation. Now—

The Court: Well, Mr. Shears, what has been done by my order except to end the probation proceeding?

Mr. Shears: That is the reason for this particular hearing this morning.

The Court: I say what has been done by this order except that? 157

Mr. Shears: Counsel, you see, for defendant here are attempting to carry water on both shoulders. They are trying to contend before your Honor that —in fact Mr. Browne's contention is just what the Government wishes to have decided this morning, but in a writ of habeas corpus served on me on December 4th he said the following, showing they are carrying water on the other shoulder when they proceed in another court.

The Court: Yes.

Mr. Shears: Paragraph 9 of that writ: "That on or about the said 8th day of November, 1936, the 158 said order admitting the relator to probation as aforementioned, and to which the said order of November 20, 1936 refers (and, as well, the warrant issued thereupon for the apprehension and arrest of the relator)"—that, your Honor is the warrant of the probation officer asking that he be sentenced under the Probation Law—"was no longer in force and effect and is no longer in force and effect and that since said 16th day of December, 1935, relator had not been subject thereto or answerable thereunder, and that since said date said separate causes and 159 separate indictments designated C-80-944 and C-96-120 have been and are fully terminated and at an end."

There is the other side of the case. Now, if that is their position now, what I want to know from your Honor is was that your intention when you signed that order? That is the only issue in this case.

The Court: That is all I did, Mr. Shears. I don't see that I did anything here except what we in-

tended to do, that is to terminate the supervision—
160 probationary supervision of this man Frad under the original order, but it left the indictment, the plea, the nature of the crime, the time in which he could be sentenced, limit, all of that is left out.

Mr. Shears: That is correct.

The Court: And if the law is that he can be arrested at any time during that period and there is no obstacle in the way of a probation order which might impose different terms, then there is nothing to prevent, there is nothing in this order to prevent you from proceeding. That is my view. I haven't thought that where a man is charged with
161 a crime and the probation supervision has ceased, that it would be probable—unless connected up with the previous crime in some way, as a direct result or something of that sort, or he had misled the Court and had violated the probation order before the release came—why the best way is to charge him with the crime and try him on the crime.

Mr. Karasik: Exactly.

The Court: But that is only my idea. Here there was no question but that the crime that he is now
162 arrested for was not committed while the probation order was in existence. That is right, isn't it?

Mr. Browne: That is correct, your Honor.

The Court: And I do not see any reason to change the order I made, provided it is interpreted as I interpret it, and that is that it follows the statute and that the probationary supervision over this defendant ceased.

Mr. Shears: In that case, your Honor, I suggest that this order, then, be resettled to strike out the

words "terminating the proceedings in this cause," because that might be interpreted by a higher court—

The Court: That is what the statute says, doesn't it?

Mr. Browne: That is what the statute says, and I certainly object to any modification of any order that would be contrary to the provisions of the statute. That is the language of the statute.

The Court: There is no probation proceeding before me, that is the way I look at it.

Mr. Browne: That is my contention.

The Court: This man Frad is not on probation with either the probation officer of the Southern District or the Eastern District or in California.

Mr. Shears: Well, he is on probation but he is not reporting to any probation officer.

The Court: He is not on probation before the Court to report to any of these various officers.

Mr. Shears: He is not reporting. He is, however, under the law on probation.

Mr. Browne: That is the question.

The Court: Now, that is a question.

Mr. Shears: That is right.

The Court: He is apparently on probation until he is sentenced or the limit of time has expired in which he could have been sentenced.

Mr. Shears: That is correct.

The Court: And isn't that right?

Mr. Shears: That is a correct statement of law, your Honor.

Mr. Browne: I can go further than that.

The Court: Yes. Then, if that is so, all I can say, I certainly have no authority to shorten that legislation.

Mr. Shears: That is right.

166 The Court: I have no right and no intention to say Congress has said so and so, but I say by an order so and so. That order would be of no avail whatever.

Mr. Shears: That is correct.

Now, there is one more point, your Honor.

The Court: But I did have a right to end the probation.

Mr. Shears: Probation?

The Court: If he were—

Mr. Shears: To end probation supervision.

167 The Court: Yes. Now, that is as much as I intended to do, and that is all I think I have done. I think that if you try to read those words, "proceedings against him in this cause be and the same hereby are terminated" it means nothing, there is no proceeding against him.

Mr. Shears: That, of course, is the Government's contention. However, I have just read you from petitioner's brief on a writ of habeas corpus which takes the opposite position.

The Court: Well, I don't think that is sound at all.

168 Mr. Shears: No, neither do I.

Mr. Browne: I do not take that position.

Mr. Shears: Now let me ask you one question which will resolve this entirely, your Honor. It was not your Honor's intention on December 16, 1935, to in any way sentence this man under the original indictment?

The Court: Not the slightest.

Mr. Shears: That is all I wish to know, your Honor.

The Court: Not the slightest bit. There was no reason for me sentencing him, Mr. Shears; there 169
was no reason for my sentencing him.

Mr. Shears: Not at all; that was the position—

The Court: We intended, as Mr. Karasik and his counsel were arguing, that he be relieved of this annoying supervision which can never do anything to rehabilitate him, he was a man of years, he has served his full term, he had paid his fine, and to have him bother the probation officer of the Southern District with failure to answer letters and things of that kind, it was simply a waste of time, and so in my opinion it should end. Now, that is all. I relieved him of that string, that supervision, 170
but to say that I attempted to amend the law which says that he still remains subject to apprehension during the period of time that he might have been sentenced by me regardless of this attempting to rehabilitate, which is in the form of a probation supervision, why, is another thing. That is not so.

Mr. Shears: The one further step that you did have at that time, the right to sentence, if you wished, but you did not at that time intend to sentence this man.

The Court: If for instance, I imagine, I had said, "I sentence you to two years and suspend the 171
imposition of sentence" and then had entered an order such as I did enter, I would have had to impose that sentence or change that sentence in some way.

Mr. Shears: Yes, you would, which would have been void, of course.

The Court: Certainly.

Mr. Shears: You had no right to do it.

The Court: Yes, I had no right to do it. I did

not impose sentence on this man on these two
172 counts, thinking that he had suffered enough if he had served his two years, at his age, on the first indictment, especially where he has pleaded guilty and thrown himself on the mercy of the Court.

Mr. Shears: Yes, that is right.

The Court: Now, that being done he walks out, he serves his term, comes back still subject with his plea of guilty, on two indictments.

Mr. Shears: That is right.

The Court: No sentence has been imposed.

Mr. Shears: That is right.

The Court: And he is constantly interfered with
173 in that sense, and the Government is put to unnecessary trouble in that sentence by a probation order, which requires supervision.

Mr. Shears: Yes, sir.

The Court: Now I cancel that, send him out into the world freed of that supervisory order, he is still subject to the law, and whatever that law is I did not change except I could sentence him, I could bring him back and sentence him.

Mr. Shears: Yes, you could do that, you have that power.

174 The Court: Yes.

Mr. Shears: Provided, of course, you were sitting in the Southern District of New York.

The Court: Yes, if I were sitting in the proper jurisdiction. I would have to issue a warrant.

Mr. Shears: That is right.

The Court: And he would be apprehended. Still, if he had violated my probation order, I would not even have to issue a warrant.

Mr. Shears: That is right.

The Court: The probation officer could arrest him and bring him before me. 175

Mr. Shears: Yes, that is the correct statement, as I see it.

Mr. Browne: Your Honor, I do not agree with my adversary in his construction and interpretation of the law.

The Court: That is on the habeas corpus?

Mr. Browne: Yes.

The Court: I am not going to argue that now before me, if you are going to argue it before Judge Bondy.

Mr. Browne: Yes, that is right. And at this time I must disagree with your Honor's offhand impression as to the effect of that release from probation. 176 We are not carrying water on both shoulders. We allege the fact to be in our petition that your Honor discharged this probation order and discharged him from the obligation thereunder, and it is our further contention that the legal effect of that decision is a question of law that will be raised in the habeas corpus proceeding and is not involved here.

The Court: Well, I will tell you—

Mr. Browne: And I would like to offer a suggestion to your Honor. 177

The Court: If this order read this way, "and the defendant is discharged from further supervision and the probation orders existing against him in this cause be and the same hereby are terminated,"—

Mr. Shears: That would be correct.

The Court: I think that is correct.

Mr. Shears: I think that is correct disposition, your Honor, and I so move.

178 Mr. Karasik: Just a minute, if your Honor please, I want to say a few words, because this order, as I stated before, if your Honor please, was obtained in an orderly manner.

The Court: Right; but that is all I was doing, Mr. Karasik.

Mr. Karasik: But your Honor has gone to a great deal of pains, got a report, this man is a sick man, there is no charge made that the order was obtained by any misrepresentation, as a matter of fact there is nothing here to show that he has done anything to violate the probation if such a probation had been in force.

179 The Court: I understand that.

Mr. Karasik: There is a charge made against him. Why not try him on that charge? Why not wait until that second charge is disposed of before you start resort to this violation of probation?

The Court: No, I will tell you what I think. I would not think that you could argue very well differently from what we have contended here, the Government and myself, but of course counsel hang their hats on any hook they can find, but I don't want any mistake to be made here. I will

180 tell you what I think clears it right up, and I think it is absolute—"that the defendant is discharged from further supervision and the probationary proceedings against him in this cause be and the same hereby are terminated." I think that is absolutely all that was intended and is exactly correct.

Mr. Browne: I don't want to argue the question with your Honor, and I don't want the impression to gain ground that we are trying to be technical, Judge—

The Court: Well, I will resettle the order with that amendment, that is the word "probationary" 181
to precede the word "proceedings."

Mr. Browne: Well, your Honor, I think that might tend to invalidate our habeas corpus proceeding. I think, your Honor, we don't question it, there is no necessity for resettling the order, I don't question but that your Honor intended to terminate the probation proceedings.

The Court: Well, that is all. That is all I did do.

Mr. Browne: Well, we don't dispute that.

The Court: Well, that is the trouble. Mr. Shears says you put in a clause there which would mean even the proceeding under the statute. 182

Mr. Browne: No, I didn't say that at all. What I meant, what I am alleging is that the effect of terminating this probation proceeding where there was no imposition of sentence, under the cases that I rely upon, the effect of that is—the legal effect is to definitely terminate the cause, not your Honor's order. I say that is the legal effect. I am pleading the legal effect of the termination of the probation order.

The Court: Well, of course, the other thing is not obvious, it is a matter for you to argue, but that does not affect the matter before me. I want 183
to clear my order up, or any dispute at all. What Mr. Princeline and myself were concerned with was the probationary proceeding which I had instituted by an order, and I intended to give Mr. Karasik, counsel for Mr. Frad, the advantage of having his client free on the probationary supervision, let him go out.

Mr. Browne: Well then, your Honor, can't we dispose of that by having the proceedings here this

morning made part of the earlier record? I will
184 consent to that.

The Court: I don't care how you do it, although I have to eliminate any argument by counsel through different channels. Of course you could not very well and you should not argue differently, but to eliminate it so that there will be no interpretation falsely, I will resettle this order to add the word "probationary" before the word "proceeding," and that covers everything in connection with the probation order that I intended to do or that you may claim. I have nothing to do with the effect. You can argue that. Suppose I had not put him on
185 probation and had just suspended sentence, which would be illegal, and then he were arrested and the Government said, Why, he is liable to be arrested, for ten years, at any time,—you can argue that regardless of my order, there is no question about that.

Mr. Browne: Now, your Honor, before you resettle the order, I have no objection to that resettlement if it will not tend in any way to jeopardize our habeas corpus proceeding. I would like an opportunity to look at the law on that and see
186 whether it will.

The Court: I don't want to jeopardize your proceeding, because you are raising an entirely different question.

Mr. Browne: That is it.

The Court: I don't see how it could jeopardize it.

Mr. Browne: Well, I don't say it will, but I don't want to take any chance. I think our position is right. As I say, your Honor, it is a virgin question which must ultimately go to the Supreme Court of the United States. It is a matter of importance to

the Government and it is a matter of importance to probationers. 187

The Court: Well, I will do this, then, Mr. Browne. I will say this, that I think that we all agree, even yourself, that the word "probation" or "probationary" before the word "proceeding" does no more than to make very clear the intention of the Court at the time. I am perfectly willing to resettle the order so that the word goes in as indicated, in order to avoid any complication in regard to the form of the order, which otherwise would be far beyond the jurisdiction of this Court. Now, if the United States Attorney, with that statement on the record and with this discussion, wants to wait before he presents an order to resettle until you have had your argument, with the understanding that if inadvertently you commence to argue the other way, that Inch, *J.* has taken away the authority to do anything under the indictment, why then he can show this record— 188

Mr. Browne: Oh, yes.

Mr. Shears: That is exactly what I was going to urge.

Mr. Browne: I am not going to argue that at all.

The Court: But if Judge Bondy grants the writ, then, of course, we can resettle the order anyhow, as a matter of record, for further appeal. 189

Mr. Shears: Yes. The Government is willing to adjourn the resettlement.

The Court: That is all.

Mr. Shears: Under the condition, of course, that you will resettle on the basis of this argument this morning, in accordance with the record.

The Court: Oh, yes.

Mr. Karasik: Also subject to a brief and memo-
190 randum which I want to submit, your Honor. Your Honor, you want to look into the matter further—

The Court: No, I am afraid I can't come over again. I like to be over here, but I have heard this argument and I have made my decision, and my decision is to resettle this order so as to insert the word "probationary" in front of "proceedings," because that accomplishes just what I had in mind. When you will present the order is a matter for the discretion of the United States Attorney.

Mr. Karasik: May I offer a suggestion?

The Court: Yes.

191 Mr. Karasik: And I think it will be agreeable to the United States Attorney. You are very familiar with this proceeding, and I should think myself, and I believe that Judge Bondy would be agreeable, that your Honor being so familiar with the history of this case, that we argue before you and have consideration of my contentions in the habeas corpus proceeding. I would like your Honor, if you will, to hear argument, and I am sure Mr. Shears would have no objection.

The Court: Well, thank you, but I am not des-
192 ignated here at all. I haven't any authority to sit in this district except I have got a right to come over here and resettle an order, but I haven't any right to come over here and hear a writ of habeas corpus that is not dependent upon my order at all, it is aside from that. The only argument that you could make in which my order would appear would be that the law is as follows, but that Judge Inch by an order of probation has modified it in some way. Then you could argue my interference as being necessary. But where you say it doesn't make

any difference what Inch, *J.* decided, there is no probation but the law says that this man can be 193
arrested any time within the limit of the sentence that could have been imposed by Judge Inch, why, you are arguing something that any Judge over in this district can decide without me. I am much obliged. I always enjoy Mr. Browne, we have had quite some interesting cases together and we were right all the time, although we didn't quite come to the—

Mr. Karasik: The fact remains the defendant was arrested without any warrant or right.

The Court: I don't know anything about that.

Mr. Shears: That is not so, your Honor. 194

Mr. Browne: He was arrested under a probation warrant.

The Court: Resettle order and put the word "probationary" before the word "proceeding" and resettle.

Mr. Browne: Will your Honor hold up the entering of the order?

Mr. Shears: I have agreed to that.

Mr. Browne: You have agreed to that?

Mr. Shears: Yes, until such time as we find it necessary.

195

## Petition for Writ of Habeas Corpus

196 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel., WILLIAM FRAD,

Relator,

—*against*—

JOHN J. KELLY, United States Marshal for the Southern District of New York, or any other
197 person having charge, custody or control of the body of the above named relator William Frad,

Respondent.

*To the Honorable Francis G. Caffey, United States District Judge for the Southern District of New York:*

The petition of Ella Frad respectfully shows and alleges:

198

1. That she is the wife of William Frad, the relator above named.

2. That the relator herein was indicted by the Grand Jury for the Southern District of New York upon three separate indictments; that the indictment designated C-96-116, charged the relator with violating Title 18, Section 88, United States Code; that the indictment designated C-80-944, charged the relator with violating Title 22, Sections 220 and

221, United States Code and Title 28, Section 102, United States Code; that the indictment designated C-96-120 charged the relator with violating Title 8, Section 2[illegible]3, United States Code and Section 22, subdivision b, of the Immigration Act of 1922. 199

3. That on or about the 26th day of March, 1934, the relator entered a separate plea of guilty to each of said separate indictments.

4. That the United States District Court for the Southern District of New York (Honorable Robert A. Inch, District Judge, presiding) thereupon imposed upon the relator a separate sentence upon each said separate indictment, as follows: 200

Upon indictment designated C-96-116 relator was sentenced to two years imprisonment and in addition thereto to pay a fine in the sum of One Thousand Dollars.

Upon indictment designated C-80-944, imposition of sentence was suspended, and pursuant to the Act of Congress in such case made and provided, relator was ordered and was placed on probation for a period of four years to begin after relator served the said separate sentence imposed upon him under said separate indictment designated C-96-116. 201

Upon indictment designated C-96-120, imposition of sentence was suspended, and pursuant to the Act of Congress in such case made and provided, relator was ordered and was placed on probation for a period of four years to begin after relator served the said separate sentence imposed upon him under said separate indictment designated C-96-116.

202 5. That relator was imprisoned upon said separate sentence under said separate indictment designated C-96-116 in the penitentiary known as United States Northeastern Penitentiary at Lewisburg, Penna., pursuant to and in accordance with the said separate sentence and was there imprisoned and confined until duly discharged according to law. That relator also paid the said fine of One Thousand Dollars.

203 6. That by an order duly made by said United States District Court for the Southern District of New York (by the Honorable Robert A. Inch, District Judge) on the 16th day of December, 1935, the aforementioned order of probation made on the said 26th day of March, 1934 was duly revoked and the relator duly discharged therefrom and duly discharged from further supervision thereunder and by said mentioned order the proceedings against him in said causes and under said separate indictments designated C-80-944 and C-96-120 were duly and finally terminated.

204 7. That on or about the 20th day of November, 1936, a purported order was made by the United States District Court for the Southern District of New York, by the Honorable Francis G. Caffey, United States District Judge, that a warrant issue for the apprehension and arrest of the relator and that a warrant was thereupon issued for the apprehension and arrest of the relator and that pursuant thereto and by virtue thereof the relator was apprehended and arrested and is now in actual custody thereunder and detained by John J. Kelly, the United States Marshal for the Southern Dis-

trict of New York, and is now actually imprisoned and detained and restrained and deprived of his liberty. 205

8. That the said mentioned order of November 20, 1936, and the said mentioned warrant issued thereupon are predicated upon the allegation, charge, claim or pretense that the relator on or about the 8th day of November, 1936 committed an act which constituted a violation of one of the terms of the aforementioned order admitting the relator to probation and that the relator should be resentenced upon the said separate indictments designated C-80-944 and C-96-120. 206

9. That on or about the said 8th day of November, 1936, the said order admitting the relator to probation as aforementioned, and to which the said order of November 20, 1936 refers (and, as well, the warrant issued thereupon for the apprehension and arrest of the relator), was no longer in force and effect and is no longer in force and effect and that since said 16th day of December, 1935, relator had not been subject thereto or answerable thereunder, and that since said date said separate causes and separate indictments designated C-80-944 and C-96-120 have been and are fully terminated and at an end. 207

10. That the said order of November 20, 1936, directing that a warrant issue for the apprehension and arrest of the relator for alleged violation by him of said mentioned order admitting him to probation and the warrant issued thereupon and upon which the relator was apprehended and arrested

and is now detained in custody and imprisoned and
208 restrained and deprived of his liberty, as aforesaid, were and are utterly and wholly illegal, invalid, null and void, and have been so at all times, and that there was and is no jurisdiction in said court or in any Judge or officer thereof, to make or issue the same, and that the said United States District Court for the Southern District of New York is without power or jurisdiction to resentence the relator upon said separate indictments designated C-80-944 and C-96-120, and that no Judge of said *United States* District Court has power or juris-
209 diction to resentence the relator upon said designated separate indictments and that said court and any Judge thereof is without power or jurisdiction to further act in said separate causes and upon said separate indictments designated C-80-944 and C-96-120 against the said named relator William Frad.

11. That the relator is now detained, confined, imprisoned, and restrained of his liberty in violation of law and in contravention of the Constitution of the United States and the Amendments thereto and without due process of law, and that he has not been committed and is not detained by virtue of a
210 mandate or other process or the final judgment or decree of a competent tribunal or court or Judge of civil or criminal jurisdiction or the legal or valid final order of such a tribunal, court or judge made in a special proceeding instituted for any cause, nor for any act constituting a contempt of court, nor by virtue of any legal or valid execution or other process issued upon such judgment, decree or final order by any tribunal, court or judge having jurisdiction.

WHEREFORE your petitioner prays that a writ of habeas corpus issue herein directing the respondent or any other person having charge, custody or control of the body of the above named relator, to forthwith have the body of the relator William Frad, together with the time and cause of his detention, imprisonment and restraint, by whatsoever name he shall be known, called or charged, before this court, or a Judge thereof, and forthwith show cause why said relator should not go forthwith discharged from such custody, detention, restraint and imprisonment, and to do and receive what is then and shall be considered concerning him. 211

That no previous application has been made. 212

Dated, New York, December 4, 1936.

ELLA FRAD,
Petitioner.

LOUIS KARASIK and HARRIS JAY GRISTON,
Attorneys for Relator,
Office & Post Office Address,
No. 50 East 42nd Street,
Borough of Manhattan,
City of New York. 213

State of New York,
214 County of New York, ss.:

ELLA FRAD, being duly sworn, deposes and says that she is the petitioner herein; that she has read the foregoing petition and knows the contents thereof; that the same is true of her own knowledge except as to those matters therein stated to be alleged on information and belief, and that as to those matters she believes it to be true.

ELLA FRAD.

215 Sworn to before me this
4th day of December, 1936.

JOHN J. OLEAR, JR.,
Notary Public, N. Y. County.

216

## Writ of Habeas Corpus

HIS EXCELLENCY, FRANKLIN D. ROOSEVELT, President of the United States of America, 217

THE UNITED STATES OF AMERICA,

To John J. Kelly, United States Marshal for the Southern District of New York, *or any other* person having charge, custody or control of the body of William Frad,

GREETING:

WE COMMAND YOU, that you have the body of WILLIAM FRAD, by you imprisoned and detained as it is said, together with the time and cause of such detention, imprisonment and restraint, by 218 whatsoever name he shall be known, called or charged, before this Court at Room 318, in the United States Court House Building, Foley Square and Centre Street, Borough of Manhattan, City of New York, at 2 P. M. this day to do and receive what shall then and there be considered concerning him, and show cause forthwith why he, the said WILLIAM FRAD, should not be forthwith discharged from such custody, detention, restraint and imprisonment, and have you then and there this Writ.

WITNESS, Honorable John C. Knox, United 219 States District Judge, in the Southern District of New York, this 4 day of December, 1936.

CHARLES WEISER,
Clerk of the United States
District Court for the
Southern District of New York.

(SEAL)

LOUIS KARASIK and
HARRIS JAY GRISTON,
Attorneys for Relator,
50 East 42nd Street,
New York City,

220 The foregoing Writ of Habeas Corpus is hereby allowed.

FRANCIS G. CAFFEY,
U. S. D. J.

Dated, New York City, December 4, 1936.

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## Return to Writ of Habeas Corpus

UNITED STATES DISTRICT COURT

221 SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham,<br>*—against—*<br>HONORABLE JOHN J. KELLY, United States Marshal for the Southern District of New York. | C-80-944<br>C-96-120 |

222 NOW, to this Honorable Court comes John J. Kelly, United States Marshal for the Southern District of New York, and produces in open court the body and person of William D. Frad alias Edward Swift, alias Fred Warren Gorham, in obedience to the writ of habeas corpus issued out of this court, requiring that the respondent have in court on the 11th day of December, 1936, at 4:30 o'clock in the afternoon before the Honorable William Bondy, United States District Judge, in Room 318

of the United States Courthouse, in the Borough of Manhattan, City, County and State of New York, to do and receive what shall then and there be considered concerning the said William D. Frad. 223

As and for a return to the said writ of habeas corpus respondent alleges and respectfully shows this Honorable Court as follows:

State of New York,
County of New York,
Southern District of New York, *ss.*: 224

JOHN J. KELLY being duly sworn, deposes and says that he is the United States Marshal for the Southern District of New York and upon information and belief alleges as follows:

(1) The respondent admits the allegations of fact contained in Paragraphs 1, 2, 3, 4, 5, 7 and 8 of the petition in support of the writ of habeas corpus and denies each and every allegation contained in Paragraphs 6, 9, 10 and 11 thereof.

225

(2) That the petitioner has been properly committed to the custody of the respondent by virtue of a warrant issued by the Honorable Francis G. Caffey, dated the 20th day of November, 1936.

(3) That petitioner was thereupon duly arraigned before the Honorable Henry W. Goddard, United States District Judge, who enlarged the petitioner on bail in the sum of $5,000.

(4) That on December 4, 1936 the petitioner was
226 surrendered to the custody of the respondent.

(5) That on December 4, 1936, the Honorable Francis G. Caffey issued a writ of habeas corpus returnable the same day, in Room 318, U. S. Courthouse.

(6) That petitioner was duly arraigned before the Honorable William Bondy who enlarged the said petitioner on bail in the sum of $5,000.

The sources of deponent's information and the
227 grounds of his belief as to the facts hereinbefore alleged are a certified copy of the docket of the United States District Court, a certified copy of the petition for revocation of probation of E. Fred Sweet, Probation Officer for the Southern District of New York, and a certified copy of an order for issuance of a warrant to apprehend the probationer signed by Judge Caffey dated November 20, 1936, and conversations had with the United States Attorney or his representatives, as well as records kept in respondent's office.

228 WHEREFORE, deponent prays that the writ of habeas corpus may be dismissed.

JOHN J. KELLY.

Sworn to before me this
8th day of December, 1936.

LEO LOWENTHAL
Leo Lowenthal, Notary Public,
New York County, Reg. No. 429,
Commission expires March 30, 1937.

## Traverse to Return

UNITED STATES DISTRICT COURT 229

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, *ex rel.*, WILLIAM FRAD, Relator, —*against*— JOHN J. KELLY, United States Marshal for the Southern District of New York, or any other person having charge, custody or control of the body of the above named relator William Frad, Respondent. | M-17-396 230 |

WILLIAM FRAD, the relator herein, for this, his Traverse to the respondent's Return to the Writ of Habeas Corpus issued herein on the 4th day of December, 1936, by Honorable Francis G. Caffey, United States District Judge, alleges:

1. He denies the allegation therein designated (2) that the relator has been properly committed to the custody of the respondent by virtue of a warrant issued by the Honorable Francis G. Caffey, dated the 20th day of November, 1936. 231

2. He denies the allegation therein designated (3) that the relator was thereupon duly arraigned before the Honorable Henry W. Goddard, United States District Judge, and alleges that upon such arraignment he was enlarged on bail in the sum of $5000.

*Traverse to Return*

AS A FURTHER TRAVERSE to said respon-
232 dent's return to the said Writ of Habeas Corpus issued herein, the relator alleges:

3. That on the 8th day of December, 1936, an application was made to this court (the Honorable Robert A. Inch, District Judge, presiding) to vacate and for a construction by it of its order made on 16th day of December, 1936, referred to in the relator's petition for the Writ of Habeas Corpus issued herein and that a hearing thereon was had before the said District Court and that the said
233 District Court made its decision to the effect that it would resettle said order by indicating that its intention was to terminate the order made by it on the 26th day of March, 1934, admitting the relator to probation and to revoke the same and to discharge the relator therefrom and from further supervision thereunder, but did not pass upon or decide and declined to pass upon and decide the legal effects resulting from or following from said order or any rights or benefits flowing to relator in consequence thereof or as to the jurisdiction or power of this court or any Judge thereof to order the ap-
234 prehension or arrest of the relator herein or the effect of any warrant issued thereunder or as to the jurisdiction or power of this court or any Judge thereof to sentence the relator upon indictments designated C-80-944 and C-96-120, and referred to in the relator's petition for the writ of habeas corpus issued herein, or as to any of the contentions made by the relator in support of said petition for a writ of habeas corpus declaring that such matters and contentions were the subject of decision in this proceeding and that the said District

Court in no way passed thereon or decided the same. And in support thereof and as part hereof, relator annexes hereto the minutes of the said proceeding before the said District Court on said 8th day of December, 1936, same being marked Exhibit A. 235

WHEREFORE the relator prays that for the matters, reasons, claims and allegations made by him that the said Writ of Habeas Corpus be sustained and that the relator be discharged from custody and petitioned for.

Dated, December 10, 1936.

WILLIAM FRAD, 236
Relator.

LOUIS KARASIK,
Attorney for Relator,
50 East 42nd Street,
New York City.

United States of America,
Southern District of New York, *ss.*:

WILLIAM FRAD, being duly sworn, deposes and says, that he is the relator herein. That he has read the foregoing Traverse to the respondent's Return to the Writ of Habeas Corpus issued herein. That the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true. 237

WILLIAM FRAD.

Sworn to before me this
10th day of December, 1936.

FRANCIS J. WAZETER
Notary Public, Bronx County
Certificate filed in New York County.

## Hearings on December 21, 1936

238 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred W. Gorham,

Plaintiff,

*vs.*

HONORABLE JOHN J. KELLY, United States Marshal for the
239 Southern District of New York

Defendant.

Before:

HON. WILLIAM BONDY,
*District Judge.*

New York, December 21, 1936;
3 o'clock, p. m.

240 Appearances:

LAMAR HARDY, Esq.,
United States Attorney, for the Government;
By Curtis C. Shears, Esq.,
Asst. U. S. Attorney.

LOUIS KARASIK, Esq.,
and
HARRIS J. GRISTON, Esq.,
Attorneys for Relator.

Mr. Karasik: May I proceed, your Honor?

The Court: Yes. 241

Mr. Karasik: May it please your Honor, this is an argument on the return of a writ of habeas corpus. The facts briefly are as follows: in March, 1934, the defendant pleaded guilty to three separate indictments. One indictment was found in June, 1931, charging an offense committed the preceding May; the second indictment was found on February 1934, charging an offense to have committed—

The Court: Which was the first one, January?

Mr. Karasik: The first indictment was June, 1931, and the offense charged was committed in May, 1931. The second indictment was February, 1934, the offense charged being committed on June 28, 1931. 242

The Court: Is that a different crime?

Mr. Karasik: Different crimes. The third indictment was found in March, 1934, for an offense alleged to have been committed in April, 1928, and 1930.

The Court: Entirely different crimes?

Mr. Karasik: Entirely different crimes. On these three indictments, sir, the defendant pleaded guilty before Judge Inch, who was holding court in this district on the 26th day of March, 1934. Judge Inch imposed a sentence on one indictment of two years and a fine of a thousand dollars. On the remaining two indictments the decision was as follows: 243

The Court: He pleaded at the same time?

Mr. Karasik: He pleaded all at the same time. I will quote this: *"Imposition of sentence suspended, the probation for four years to begin after serving sentence on C-96-116, subject to the stand-*

ing probation order of the Court. Signed, Inch,
244 *D. J.*"

In passing let me make this statement—

The Court: Just read what the sentence was on the first indictment.

Mr. Karasik: On the first indictment—

The Court: Is it material?

Mr. Karasik: Yes, it is material. On the first indictment he was sentenced to two years imprisonment, to be confined to a place of confinement named by the United States Attorney-General, and also he was to pay a fine of a thousand dollars. On the
245 remaining two indictments, Judge Inch placed him on probation for four years. The endorsement I read before, namely, "Imposition of sentence suspended, probation of four years to begin after serving sentence on the first indictment."

In passing may I say this, if your Honor please, that on one of these indictments the statute of limitations has run against it.

The Court: *You mean at that time?*

Mr. Karasik: *At that time*, when he entered a plea of guilty.

The Court: And did you represent him then?

246 Mr. Karasik: I did not sir; I did not. Now the defendant was then confined to the Northeastern Penitentiary. He served his term, less allowance for good behavior. He paid his fine. On the 13th of December, 1935, that is after he was discharged from the penitentiary and paying his fine, I presented a petition to Judge Inch to release him from probation. I brought the facts to the judge's attention in his chambers. Judge Inch called in Mr. Printzlien, the probation officer in the Eastern District where the judge was then sitting, and after

discussing that the judge suggested that I give notice to the Probation Office in New York. I then personally served the papers on the Probation Office, and if your Honor will refer to the original papers you will find that the return day was blank, and I filled it in only when Judge Inch told me that he could hear the motion on certain days. So I came to inquire personally from the Probation Office which day would be more convenient. He selected a day and I inserted that day, and on that day, sir, we appeared. The probation officer was there; the defendant was there, and after argument Judge Inch entered an order on December 16, 1935, which in substance provides: "Ordered that the order of probation made herein on the 26th day of March, 1934—" 247 248

The Court: That was the order?

Mr. Karasik: That was the order—that was the day of sentence.

> "Ordered that the order of probation made herein on the 26th day of March, 1934, and which is in force and effect by the standing probation order of this Court be and the same is hereby revoked and the defendant is discharged from further supervision and the proceeding against him in this cause and the same are hereby terminated. Dated New York City, December 16th, signed Judge Inch." 249

I may also add in passing that this is exactly the language of Section 725 providing for that procedure, so that all Judge Inch did was to follow the law verbatim in this order.

The Court: I do not know what you are going

to drive at. You are familiar with that Greenhouse
250 decision?

Mr. Karasik: I am, sir, but I will ask your Honor's kind indulgence to present the analogy.

The Court: Yes.

Mr. Karasik: Thank you.

The Court: I only ask what the issue is.

Mr. Karasik: I will come to it in a moment, sir. In other words, the order just read by me follows the language of the statute identically. That order remained in force and effect for eleven months. No motion was made, no appeal was taken, no motion was made to modify or change it or revoke it. On
251 the 19th day of December—or the 19th day of November, rather, a complaint was made in this court.

The Court: What year?

Mr. Karasik: This year, eleven months and three days. A complaint was filed by a Mr. W. J. McNulty, who says that he is a special agent in the Federal Bureau of Investigation and he charges this defendant with larceny on the high seas. The defendant never had a hearing before the Commissioner; he was not represented by counsel before
252 the Commissioner; he waived examination and was admitted to bail. Immediately thereafter, sir, he was re-arrested on a warrant issued by Judge Caffey, predicated on an affidavit by Mr. E. Fred Sweet, the probation officer, who charges a breach of probation on the part of this defendant. The affidavit is very short. I will read it to your Honor:

> "To the Honorable Francis Caffey, Judge of the District Court of the United States for the Southern District of New York.

"The petition of E. Fred Sweet, Chief Probation Officer for the District Court of the 253
United States for the Southern District of New York, respectfully shows to this Court:

"That on March 26th, 1934, the herein named defendant was placed on probation for four years to follow a penitentiary sentence of two years on indictment 96-116, said probation sentence being for violation of the Immigration Act of 1922, that he has again returned to his criminal profession of card sharper on the high seas; that he has associated with persons of ill-repute.

254

"Your petitioner's information and belief are based upon a complaint filed on November 19, 1936, by Assistant U. S. Attorney Curtis C. Shears and investigations of the Federal Bureau of Investigation.

"Your petitioner, therefore, respectfully requests that the probation of said probationer, *William Frad*, be revoked, and that a warrant issue for his arrest, and that this petition be granted."

*Now to begin with*, Mr. Sweet, who had personal 255
knowledge of the proceeding before Judge Inch on last December, made no mention of this fact that *an order was entered by the judge* who sentenced this man, relieving him from the probation or revoking the probation. *No mention* of that was made at all. Now he was admitted to bail on that so-called breach of probation and then we surrendered him *and we sued out this writ of habeas corpus.*

There is another very significant fact, your Honor. The District Attorney in the meanwhile served

on December 2, a notice of motion. I will read it. It is important:

> "Please take notice that upon the annexed affidavit of Curtis Charles Shears, Assistant United States Attorney, verified on the first day of December, 1936, and upon all the proceedings heretofore had in this action, the undersigned will move this Court in Room 318 of the United States Courthouse, Foley Square, New York, on the 8th day of December, 1936, at 10.30 in the forenoon or as soon thereafter as counsel can be heard to set aside an order entered in this cause on the 16th day of December, 1935, signed by Honorable Robert A. Inch, United States Judge for the Eastern District of New York and for such other and further and different relief as to the Court may seem just and proper."

This motion came on regularly, sir, before your Honor on the 8th and referred to Judge Inch. We had a hearing on that motion. Testimony was taken, and in my traverse to the writ of habeas corpus I annexed and made part of it as Exhibit A the testimony taken. Now you will read it. However, I just want to call your attention to a few of Judge Inch's remarks that he made, on page 13:

> "The Court: What strikes me is that if Mr. Frad was guilty of a crime, why didn't they prosecute him directly for that crime? Why should he be lugged in under this provision?"

Have you got that, Mr. Shears?

Mr. Shears: Yes.

Mr. Karasik: Again, on page 16, it says: 259

> "Why, the best way is to charge him with the crime and try him on the crime."

He was referring to this new charge that was made against him. And again, on page 17, the paragraph before the last, Judge Inch said:

> "The Court: This man Frad is not on probation with either the probation officer of the Southern District or the Eastern District or in California." 260

Now sir, it is our contention that the order of Judge Inch of December 16, 1935, relieved the man of probation; that he was no longer on probation. Consequently he could not have been arrested for breach of probation.

The Court: That is your case?

Mr. Karasik: That is our case, sir.

The Court: Just one minute. If I read the Greenhouse case properly, then I believe the Circuit Court has held—and the United States Supreme Court has denied a certiorari. 261

Mr. Karasik: Yes.

The Court: So that under the law in that case I take that to mean this: that if a judge imposes a prison sentence and subsequently imposes a further sentence on other counts and on the other counts suspends execution of the sentence, the suspension is non-effective and the term must be served, the full term, unless a pardon is procured.

Mr. Karasik: In that case, if your Honor please—

The Court: Now you distinguish that case.

262 Mr. Karasik: Judge Inch distinguished the case—

The Court: In other words, as I understand the effect of the original sentence in this case, he was sentenced to one year in jail on the first one—

Mr. Karasik: Two years.

The Court: How many were there?

Mr. Karasik: There were three separate indictments, if your Honor please. The Greenhaus case is one indictment with several counts.

The Court: That is the way you distinguish it.

263 Mr. Karasik: That is exactly the position that Judge Inch took at the hearing. The Greenhaus case was one indictment with several counts, and the Courts held that you cannot send a man to prison on one count and then put him on probation on the others. Here are three separate indictments.

The Court: I think I decided that, didn't I? Didn't I decide that in a case recently, the Sewell case?

Mr. Shears: Yes. Judge Inch did not pass on this question; he did not have this question before him.

The Court: I had the Sewell case recently, didn't

264 I?

Mr. Shears: Yes, I think Mr. Rogers had it. I will refer to it presently.

The Court: Well that is your distinction?

Mr. Karasik: That is correct; that is the distinction that I make, three different crimes committed at different times.

The Court: On one indictment he served a jail sentence?

Mr. Karasik: He served.

The Court: And on the other indictment?

Mr. Karasik: He could be placed on probation. 265

The Court: He could be punished without reference to the other punishment.

Mr. Karasik: That is correct. And if your Honor please, please bear in mind that this is a remedial statute.

The Court: *I cannot go behind* that.

Mr. Karasik: I know, but that statute must be liberally construed.

The Court: I have posed and expressed it to every one of the Circuit Court judges that that would be reversed by the United States Supreme Court; however, the United States Supreme Court has not 266 taken jurisdiction.

Mr. Karasik: The point, however, that I want to bring before your Honor as forcibly as I can is that there cannot be any breach of probation when there is no order of probation outstanding. Whatever order there was the Court revoked it.

The Court: Assuming now that you are arguing as to one indictment of three counts.

Mr. Karasik: Yes.

The Court: Then on the subsequent counts the punishment would mean a jail sentence. The sus- 267 pension of execution is what the Circuit Court says is not good; the rest of it stands, but the execution of it does not. The suspension of execution does not stand, therefore if there were one indictment of three counts the way I read it is that there be a prison sentence on the others; for how long a term?

Mr. Karasik: For four years.

The Court: For five years in all.

Mr. Karasik: No.

The Court: How much was the first count?

268 Mr. Karasik: Two years.

The Court: Six years in all.

Mr. Karasik: He served two years on the first one.

The Court: This is on one indictment with three counts. Then according to the Circuit Court judges he would have to go to jail for six years.

Mr. Karasik: Correct.

*The Court:* And everything counts but the execution of sentence, that is the way I understand the decision.

269 Mr. Karasik: But, if your Honor please, he was not sentenced. There is another distinction there; just the same as in the Greenhaus case, there was a sentence imposed on all the other counts. Here, however, there was no sentence.

The Court; Read that again.

Mr. Karasik: I will read it to your Honor:

> "Upon the remaining two indictments Judge Inch placed him on probation for four years."

He did not suspend sentence; then he put him on

270 probation; he placed him on a period of probation. I will read it again: "Imposition of sentence suspended, the probation of four years to begin after serving sentence on C-96-116 under the standing probation order of this Court."

The Court: That is a peculiar sentence. He should be sentenced—

Mr. Karasik: Yes. I want to say this to your Honor, I am not disclosing any confidence, because Judge Inch expressed himself off the effect—it is

a matter of record, and Judge Inch felt that the sentence on a plea of guilty was pretty stiff, as he said, with two years. 271

The Court: Your best point, I think, is the last point; that he was not sentenced.

Mr. Karasik: No, he was not. I also want to call your attention to the fact that Judge Caffey, in the warrant, said as follows:

"It appearing to the said Court that on March 26, 1934, this court suspended sentence on the abovenamed defendant and placed him on probation pursuant to the Act of March 4, 1925, and that the abovenamed defendant has violated one of the terms of his probation: that is, he has committed larceny by trick on the high seas," etc. I say there was nothing to violate. There was no order at that time outstanding. 272

The Court: I do not think there was any suspension of execution that Judge Caffey states. However, I will hear your adversary as to that.

Mr. Shears: Your Honor is familiar with most of these cases.

The Court: I understand. It was well presented. I see the point. 273

Mr. Karasik: Thank you very much.

Mr. Shears: Your Honor has heard many of these cases, and you are quite familiar with the Greenhaus case, so I need not go into that. All I will say in approaching this subject is that this case raises squarely the Greenhaus issue. Regardless of the fact that in this case the imposition of sentence was suspended and there was no suspended sentence, the imposition was suspended and he was placed on

probation for a future term of four years, after
274 the completion of sentence.

The Court: I do not know whether that is a contradiction in terms. You must sentence and then place on probation? Can you place on probation without sentencing? Do you follow me?

Mr. Shears: Yes, I follow you.

The Court: Here you have a technical question of law.

Mr. Shears: You can sustain the imposition of sentence or you may suspend the execution.

The Court: You may suspend the imposition of
275 sentence during good behavior.

Mr. Shears: That is right.

The Court: That would not be probation.

Mr. Shears: That is correct.

The Court: It seems to me—I am not sure—it is similar to this case; you cannot have a parole until after sentence. What does the statute say? Can you point that out, about the sentence?

Mr. Griston: Yes; *it is exactly what* you may do.

The Court: Have you got the statute?

Mr. Shears: I know; in 725 under Title 18, your
276 Honor, it is absolutely essential.

A Voice: I will read it: "The Courts of the United States having original jurisdiction of criminal actions, when it shall appear to the satisfaction of the courts that the ends of justice and the best interests of the public as well as the defendant will be served thereby, shall have power to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best," and the remainder of the statute is immaterial at the present time.

Mr. Shears: As your Honor will note from that statute, it is immaterial whether the judge has 277
made the suspension of the sentence or the suspension during the probationary period. According to that statute it must follow suspension. Now going over the facts, I do not agree with my adversary. There are three indictments in this case. This case went to trial on the 21st day of March, 1934. At that time the Government, supported by a memorandum of law, moved for a consolidation of these three indictments. It was then that a plea of guilty was entered, so that the Government's contention then and now is that the series of transactions were one and the same for all indictments. 278
They were not one crime, because three statutes happened to cover that one series of transactions, but it was one series of transactions and one sentence was imposed as a result of these pleas to these indictments.

Now the defendant mentioned, although it is not material, that one of the indictments had been barred by the statute of limitations. That is not true.

The Court: We will dispense with that.

Mr. Shears: Yes, we will dispense with that. 279

The Court: His lawyer did not take advantage of it.

Mr. Shears: No.

The Court: It is unfortunate.

Mr. Shears: One of the contentions of my learned opponent is that an order entered by Judge Inch in the Eastern District court now prevents your Honor from imposing sentence because Judge Inch purports to do, in this order, according to the interpretation of my opposition—

The Court: Let us get right to the gist of it.

280 Mr. Shears: Yes.

The Court: I think the crux of it is what was the original sentence.

Mr. Shears: The original sentence in this case was that the imposition of sentence is suspended.

The Court: Under what are you holding him?

Mr. Shears: We are now holding him at this time under the Greenhaus case. We have not as yet tried the probation violation because we feel that the Greenhaus case bars the Government from trying that.

The Court: Go ahead with your argument.

281 Mr. Shears: Just so that the Court will understand what the issue is here, the complaint in this case and the probation violation or the warrant for probation violation have nothing to do with this argument at all. This argument is prefaced on one thing only, the Greenhaus decision.

The Court: The argument is on the habeas corpus.

Mr. Shears: That is right.

The Court: By what right are you holding the defendant?

282 Mr. Shears: We are not holding him.

The Court: Is the defendant out on bail?

Mr. Shears: Yes, your Honor.

Mr. Karasik: He is out on bail.

The Court: I am going to ask you a question: are you satisfied that you are here arguing on the habeas corpus when a man is out on bail?

Mr. Shears: I argued that once before, at the time the writ was drawn before your Honor.

The Court: Yes.

Mr. Shears: You said in that case you would

not consider it in order to raise this issue, and I am willing to go along despite the fact that I feel 283
he should not be out on bail. I am willing not to raise that point.

The Court: My point, again, is this: it is as sure a question of law as can be presented.

Mr. Shears: That is right.

The Court: Can a man, or a prisoner, be out on bail? Can you grant or hear an application for a writ of habeas corpus? The writ of habeas corpus means that the person in whose custody he is shall produce him. He is now in nobody's custody. I know that has been passed on thousands of times. Have you looked it up? 284

Mr. Griston: We have looked it up; yes, your Honor.

Mr. Karasik: We have looked it up, and we have briefed it in our memorandum.

The Court: Are you satisfied when a man is out on bail that a Court can hear argument on the return of the writ of habeas corpus?

Mr. Shears: Under these facts I am satisfied that it can be done.

The Court: You have looked it up?

Mr. Shears: Yes, I have looked it up; it is not generally done, but it is in your discretion. You 285
have already passed on that point over objection of counsel for the Government, and so I will not raise the issue at this time.

The Court: What did I pass on?

Mr. Shears: You said that you would grant bail, over my objection.

The Court: You do not object to the Court's denying you, and bail has been granted and he is at large?

Mr. Shears: Yes.

286 The Court: Can you then hear argument, or must a man be in actual custody and not out on bail in order to entitle him to be heard on a writ of habeas corpus? I am asking an entirely different question. If I allow him to go out on bail does he forfeit any right to get a writ of habeas corpus?

*Mr. Shears: He does not: that is* within your discretion, to do that.

The Court: Did you look that up?

Mr. Shears: Yes; you have a right, in your discretion. You have that right.

287 The Court: Have you looked it up?

Mr. Karasik: Yes, your Honor.

The Court: Is it discretionary?

Mr. Karasik: Yes. I am going to quote from a case.

The Court: You have briefed that?

Mr. Karasik: Yes, I have submitted the brief to your Honor, and here is a portion of an opinion in a case.

The Court: You say you have not done it?

Mr. Karasik: I have already done it, your Honor, it is in that memorandum. I shall submit the copy

288 if you want me to.

The Court: I mean with your other argument?

Mr. Karasik: Yes.

The Court: If I have no jurisdiction I do not want anything to do with it.

Mr. Karasik: You have jurisdiction, your Honor.

The Court: You are asking me about bail; I do not think you have submitted a brief about that.

Mr. Karasik: I have, your Honor; I did.

The Court: Did I write an opinion on it?

Mr. Karasik: No, you just let him out on bail.

Mr. Shears: There was no argument on that.

Mr. Karasik: Then the point is not being raised; 289
the man is here now.

The Court: I remember the incident when you applied for the writ of habeas corpus, and you also asked that he be placed on bail.

Mr. Karasik: That is correct; it was consented to.

*Mr. Shears: There is no issue on that,* your Honor.

The Court: I did not read your brief.

Mr. Karasik: We had a brief ready, but it was *not necessary. The* Government consented to that.

The Court: Go ahead. If I must assume juris- 290
diction I will. If not it is so complicated that I won't. I did not pass on that point yet, did I?

Mr. Shears: No.

Mr. Karasik: But, if your Honor please, the Government stipulated to that and as far as the authority in the Court to do that, permit me to read from *a decision in the case of Ex parte Thaw, 209 Fed.*

The Court: I will take your brief on that.

Mr. Shears: I suggest that he submit on that point.

Mr. Karasik: All right.

Mr. Shears: This is not an issue at the present 291
time.

Mr. Karasik: That is not an issue at the present time.

The Court: It certainly is an issue.

Mr. Karasik: No.

The Court: Suppose a man is out on bail and a writ of habeas corpus fails because he is not in custody, he is at large. That is fundamental. I know that the writ reads to the man who has got him

in his custody, to produce him. No one has him
292 in his custody now.

I do not say that you are right, but he says it is not in issue; it is fundamentally in issue. It underlies the whole issue.

Mr. Griston: May I point this out, your Honor? At the moment when the writ was sued out he was actually in custody. Then the writ was taken out, and that is the proper basis for the writ. Thereafter, for matters of convenience, we stipulated that he could go out on bail. That did not invalidate the fact that at the time of the writ he was
293 in custody.

The Court: Well when a writ has been issued and he has been taken out, the Court has jurisdiction.

Mr. Karasik: Correct.

The Court: Is that the law?

Mr. Griston: That is the law.

The Court: That is fundamental.

Mr. Griston: Yes.

The Court: I have got to be satisfied as to that. I do not say that you are entirely wrong.

Mr. Griston: All right.

The Court: But you must know that they are
294 right, they are probably right. You are both good lawyers before me. As I say, you are on the other side. You should have looked it up to see if I have jurisdiction.

Mr. Shears: I have looked it up, and I will state for the purposes of the record that I agree with counsel on the other side.

The Court: That I have jurisdiction?

Mr. Shears: Yes.

The Court: Go ahead.

Mr. Shears: Now there are only two issues in this

case. One is whether Judge Inch's order of December 16th, 1935— 295

The Court: Is that the original order?

Mr. Shears: No, that is the order discontinuing probation reporting.

The Court: What bothers me now is what was that original sentence?

Mr. Shears: I am coming to that; that was my second point. The other issue is whether that original sentence was legal or not. The Government contends it was not legal and it uses as a case directly in point the Greenhaus case and your own decision in that Sewell case which follows the Greenhaus case. 296

The Court: Did you see that decision?

Mr. Griston: Yes, your Honor, we will distinguish it later on.

Mr. Shears: Now disposing of the issue as it arises, we will proceed first with the issue of Judge Inch's order signed in the Eastern District of New York, which purports, according to their interpretation, to discontinue any probation proceedings in this matter. The Government's contention is that Judge Inch had no jurisdiction either as a matter of time, because the term of court had long expired, inasmuch as the original sentence was imposed in 1934 and this was not until December 16, 1935, that this order was issued,—incidentally he was not in the Southern District of New York—so that he could in no way modify that sentence. 297

The Court: That may all be. I was going to interrupt to ask whether he had any further jurisdiction after the ninety days, but assuming the judge acts without further jurisdiction after ninety days—can the judge who is in a coordinate jurisdiction question his right to act?

Mr. Shears: Yes, he may, because a judge may
298 modify—

The Court: I do not care for your opinion; have you got the law?

Mr. Shears: I have the law, and I will submit it to you in the brief.

The Court: That is one of the points of law.

Mr. Shears: Yes.

The Court: Being of coordinate jurisdiction; I do not know about that. Must there be an appeal?

Mr. Shears: No, there need not be an appeal; you may modify his order if it lacked jurisdiction in the original instance.

299 The Court: If you have the law on it all right.

Mr. Shears: I have the law, and I will submit it to you.

The Court: Proceed.

Mr. Shears: The law is outlined here (indicating memorandum).

The Court: That brings us down to the original point.

Mr. Shears: To the second point, whether this case comes under the Greenhaus case or not.

The Court: What was the effect of the original
300 sentence, put it that way?

Mr. Shears: The original sentence which purported to put this man on probation after a term is illegal under the Greenhaus holding, and as a result there was no sentence on these two indictments, namely, C80-944, and C96-120, so it is the duty of your Honor at this time to sentence him under these two indictments upon which no sentence was made, under the Greenhaus decision.

The Court: We are all agreed, then, that the effect of the original sentence was a sentence of two years.

Mr. Shears: That is right.

The Court: And nothing else? 301

Mr. Shears: That is correct; that is the Government's position.

The Court: Now I will ask you: why shouldn't the judge who imposed the original sentence, just on your argument, do the re-sentencing?

Mr. Shears: He may, but you also have the right, inasmuch as this judge is one of the Eastern District Court, and he is *not now sitting in the* Southern District; you have the right to take the jurisdiction in the Southern District, where it belongs.

The Court: Are you people satisfied that Judge Inch passes on it? 302

Mr. Karasik: Yes, your Honor, Judge Inch knows all about it. Judge Inch has discussed it with the probation officer both for the Southern District and the Eastern District, and I am pretty sure we should go before Judge Inch.

The Court: On your argument it is up to the Court to impose sentence. I do not know what Judge Inch meant to do. He gave him two years. That is agreed. But did he need to give him a jail sentence, if anything a year or two years, or anything? This was on pleas, you say? 303

Mr. Griston: He has answered that, your Honor.

The Court: It was on plea?

Mr. Griston: It was on a plea of guilty, and he has answered that. He said he gave him a very stiff sentence, two years and a thousand dollars fine, on a plea of guilty, where he saved the Government the time and expense, and it was only for a violation of a passport law; I mean it was a very inocuous thing. He said, "I gave him an awful stiff sentence," and the man is suffering from heart trouble.

The Court: Do you object to going before Judge
304 Inch?

Mr. Shears: Well, Judge Inch would object to taking the case; he has already indicated that in the last hearing which we had before him.

Mr. Griston: He has not taken it.

Mr. Shears: He said that this case should come before the Southern District of New York and before Judge Bondy, and not before himself.

Mr. Karasik: I respectfully and emphatically challenge that statement. I would like to be shown where it is. Judge Inch did not make any such statement. If anything, I will tell you what he
305 said. I suggested that Judge Inch entertain argument on the writ of habeas corpus and the other side did not answer anything about it at all. After the hearing was adjourned Judge Inch said, "Well, the other side weren't apparently anxious for me to hear the argument," so Judge Inch never expressed himself. Another thing—

Mr. Shears: May I interrupt at this point?

Mr. Karasik: Just a moment.

Mr. Shears: Not if you are going to a new point.

Mr. Karasik: All right.

306 Mr. Shears: On page 29 of the hearing this is what happened:

> "Mr. Karasik: And I think it will be agreeable to the United States Attorney. You are very familiar with this proceeding, and I should think myself, and I believe that Judge Bondy would be agreeable, that your Honor being so familiar with the history of this case, that we argue before you and have consideration of my contentions in the habeas corpus proceedings.

I would like your Honor, if you will, to hear argument, and I am sure Mr. Shears would have no objection." 307

Then the Court said:

"The Court: Well, thank you, but I am not designated here at all. I haven't any authority to sit in this district except I have got a right to come over here and resettle an order, but I haven't any right to come over here and hear a writ of habeas corpus that is not dependent upon my order at all, it is aside from that." 308

Mr. Griston: That is true.

Mr. Shears: Just a moment.

Mr. Griston: I am sorry.

Mr. Shears: (Continuing reading) "The only argument that you could make in which my order would appear would be that the law is as follows, but that Judge Inch by an order of probation has modified it in some way. Then you could argue my interference as being necessary. But where you say it doesn't make any difference what Inch, J. decided, there is no probation but the law says that this man can be arrested any time within the limit of the sentence that could have been imposed by Judge Inch, why, you are arguing something that any Judge over in this district can decide without me. I am much obliged." 309

Mr. Karasik: One moment. This only refers to the argument on the writ of habeas corpus. I suggested in the beginning of this colloquy that Judge Inch take cognizance and hear argument on the writ

of habeas corpus. Never was any discussion had
310 upon Judge Inch resentencing him, and I went further, if your Honor please, to go on the record that we do not concede at this time that whether your Honor or Judge Inch has the right to resentence him because there was no breach of probation, there was no order of probation either oral or otherwise, why, Judge Inch relieved him from probation by that order of December 16, 1935.

Mr. Griston: May I add this, your Honor, and this will probably help clear up some things: if they claim that they are not urging a breach of proba-
311 tion, but they claim a right to sentence him under the original plea of guilty, which I understand now is their argument—

The Court: Is that your argument now, that he is to be sentenced on the original plea?

Mr. Shears: The writ of habeas corpus raises that issue only.

Mr. Griston: I would like to make out what their position is. I will take either side now. If it is a position that he should be sentenced under the original plea of guilty, he is not here on that because the warrant here brings him in for violation of the
312 probation of an order of March 26, 1934, which order was terminated by Judge Inch's order, which is a valid order standing and which your Honor cannot ignore—I do not think your Honor would want to ignore it—and which they can test on appeal, and which they made a motion on to set aside and it was denied.

Mr. Shears: I object; there was no denial. In fact it was granted.

The Court: What did Judge Inch decide?

Mr. Griston: They moved to vacate, and the motion was denied. Then they did this— 313

Mr. Shears: It is all incorrect; I will state the correct position.

Mr. Griston: Will you please permit me to make my observation, and then you correct me if I am wrong.

The Court: Go ahead.

Mr. Griston: Then they said to the judge, "Will your Honor insert the word 'probation terminated' instead of 'proceedings terminated' " and the judge said this, "I will insert the word 'probation' in my order if you will submit such an order to me." Now 314 if he did even that; "terminated probation proceedings," and if he did it nunc pro tunc we come forward with these two points.

The Court: What did he decide?

Mr. Griston: He decided that if they submit the order—I will read it to you; that is the best way.

Mr. Karasik: May I give you the minutes (handing to Court).

Mr. Griston: Let me read the words. I think it is on page 29.

Mr. Karasik: I want your Honor to note that I have just handed you a copy of the minutes that 315 he is reading from now.

Mr. Griston: "My decision is"—page 29—"to resettle this order so as to insert the word 'probationary' in front of 'proceedings,' ".

The Court: What did he mean? Read it.

Mr. Griston: All right. Now I will read the order, if I may. This is the order:

> "Ordered, that the order of probation made herein on the 26th day of March, 1934—" that

316 is the order that they claim he violated—"and which is in force and effect by the standing probation order of this Court, be and the same is hereby revoked and the defendant is discharged from further supervision and the proceedings against him in this cause be and the same hereby are terminated," and there he said, "I will resettle to insert in front of the word 'proceedings' the word 'probationary' so as to make it 'terminated the probation proceedings.' "

317 Now let us look at it in two ways, if I may so state. I have stated—and the record sustains what I said before when he says I was incorrect—first, if it was only the probation proceedings that were terminated, he is here for violating the probation, and that being terminated there is nothing to violate.

The Court: Except he said that the judge had no right to make such a sentence.

Mr. Griston: Oh, you do not test it that way; you test it by appeal from the order.

The Court: That may be entirely without jurisdiction.

318 Mr. Griston: Even so, that is tested on appeal from that order.

The Court: He said he has briefed it.

Mr. Griston: Oh, he has not; he has not done anything of the kind.

The Court: Is that when a judge has coordinate jurisdiction or has assumed jurisdiction, that his colleagues cannot question him; is that right?

Mr. Griston: Not in this case. May I come to that in a moment if your Honor will bear with me,

because I want to make one other point, and then I will come to the point that your Honor has raised. 319
The other point is this: the order as originally entered, the original order did not merely terminate the probation proceedings. It terminated the proceedings. Now they have a dead proceeding, a closed, paid-up proceeding. There is nothing on which to proceed and an order entered—

The *Court: Unless that order* is not worth the paper it is written on.

Mr. Griston: And may I add this, you cannot nunc pro tunc create an order which he is going to have violated by an act he already has done. 320

Now on the point that your Honor raises; there was nothing wrong here with this order, for these reasons, and it will be perfectly obvious to your Honor: there is not any question that the Court had power. This is not an exercise of a right that the Court did not have. It is not a case where somebody who is not a judge acts as a judge. It is a judge of the court, of the Federal Court who had sat in a case over whose probation proceedings and over whose orders he has at all times had jurisdiction, who exercised the right that he had as a matter of law and as a matter of practice, and if he should 321
not have as a matter of routine done so, it was a power that he had, and having exercised that power it cannot be disturbed. In the next place, that order was by the judge who sat in the hearing, who had the probation on notice to the probation officer, as required by law, and filed in the Southern District of New York. It is an order filed in this court as required by law, so it is an order on file with this court. Next, the order here—they move here

to resettle the order, and to amend it, and they
322 moved it in this court, and on their motion the matter was referred to Judge Inch to hear it, and he heard it. I have read to your Honor what he said; he resettled, nunc pro tunc. They have recognized the validity of that order, so not only is it a valid order of this court, not only did the Court have the power to grant the order, not only has the court power over all that, not only has it been on file in this court, but it has been recognized and validated. This is a probation, your Honor. It is a continuing term. It is not resentence. There
323 was no sentence. Then how could there be a resentence? You cannot resentence after ninety days. With a probation, you can declare it null; you can also declare it at an end or you can also recall and sentence a man; you have that right, except that the sentence must be within the term, so that here the Court had power to do that. We will brief it. They are raising the question of venue.

The Court: How do you distinguish my former case from this?

Mr. Griston: Your former case?

The Court: You said you would distinguish my
324 case.

Mr. Griston: What was the case? I do not know what the case is.

Mr. Karasik: I saw the case yesterday in the library; I read that decision.

Mr. Griston: The Greenhaus case?

Mr. Karasik: No.

The Court: I decided a case similar to this.

Mr. Karasik: You decided the case, and I only saw the reference to it in the brief, in the Lawyer's County library.

Mr. Griston: Your Honor, we have not seen that case; it has not been briefed, and I do not know 325
of any such decision that your Honor made; I would like to look at it. I think we are entitled to see it.

The Court: I know the question was up before me.

Mr. Griston: What were the circumstances?

The Court: The question before me was just like the one raised here. There were separate indictments, and the sentence was at the same time. The sentence was a prison sentence on one indictment, and on the others I suspended sentence. I held that it must be regarded that the object of the 326
law was to avoid sentencing a man to jail—if you once send him to jail you have no right to place him on probation.

Mr. Griston: Will your Honor bear with me?

The Court: That is my case, isn't it?

Mr. Shears: Yes, that is your case and this is the same case.

Mr. Griston: Was that a single transaction or a separate transaction?

The Court: Two separate indictments.

Mr. Griston: All right, that is different.

The Court: I claim under that Greenhaus case 327
that the purpose was to avoid sending a man to jail, if you could help it, and it is inconsistent to send him to jail and at the same time grant him a probation. That is the way I understand to be the Murray case and the Greenhaus case.

Mr. Griston: I am familiar with the Murray case and I am familiar with the Greenhaus case, but let me say this: I discussed the Greenhaus case, but before I go to that I say the Greenhaus case is not here.

The Court: I understand that. You have different
328 features here.

Mr. Griston: I say we have not reached the Greenhaus case.

The Court: I understand that.

Mr. Griston: Because the warrant here does not raise any charge.

The Court: I understand.

Mr. Griston: But if we get to the Greenhaus case—and I do not think we ever do, not on this warrant—maybe on another warrant—but if we do then I point this out to your Honor: suppose a
329 man is tried on one indictment for arson, and under another indictment for larceny. Those are two different crimes committed at different times. Now you cannot say that because a judge wants to let him go under one that he must let him go under the other, or because he wants to hold him upon one heinous crime that he has to do it under the other, too.

The Court: I imagine that the distinction there, from practical experience—I am here every day—that if a man is indicted and pleads guilty—I would not ask him whether he has actually been in jail,
330 but I suspend or not. As you say, it is a separate indictment and a separate transaction but the question is whether it is done simultaneously: can you send him to jail and place him under probation?

Mr. Griston: The only thing is this: in the Greenhaus case it was one indictment.

The Court: Transaction.

Mr. Griston: No, further than that, the same transaction. Here you have transactions in different years, in different countries: one in France.

One is the passport question which was at a different time. 331

The Court: I do not blame you. I have difficulty in understanding, and so do you. I do not know what that would amount to.

Mr. Griston: Let me go further. I think this will simplify the matter. The Greenhaus rule, as now enunciated is a harsh rule. I do not think it should be extended beyond the four-square corners of that decision, and this being a different case, where Judge Inch says, "I have been unusually hard on this man"—he is a very sick man, he has not long to go—"I am going to let him out." I do not 332 think we ought to extend that.

The Court: I won't extend it.

Mr. Griston: That is what they want to do.

The Court: I think the decision is one for a very good purpose.

Mr. Griston: It has its purposes.

The Court: I think the idea of sending a man for a short time to jail and giving him probation is a good thing.

Mr. Griston: Yes. Now your Honor there is one more thought that I forgot to mention.

The Court: I agree with you. It is a pure ques- 333 tion of law. I will hear your adversary.

Mr. Griston: May I add one more thought, which I forgot?

The Court: You have it all messed up, though.

Mr. Griston: It is a messed up case, because they are hounding this man. If they have a crime against him let them indict him, but they cannot do it. However, there is one thought I forgot, I have mentioned it but I think I ought to call your Honor's attention

to it, in the Hollandsworth case, the case that they
334 rely on, and the Court said this: "You cannot hold a man for violating the terms of probation unless the terms have been given to him and then you can hold that he violated those terms."

Here not only have we no terms given to him, he was out; there were no terms for him to violate, under the Hollandsworth case that they rely on.

The Court: I understand that; the judge said during good behavior.

Mr. Griston: They did not say that; they said nothing of the kind.

335 The Court: I understand.

Mr. Griston: Now may we have a couple of days to put in a brief on this? They have given us their brief, which is about fourteen pages, and I would like to have a couple of days to reply to it.

The Court: Exchange briefs.

Mr. Shears: They have had over a week to put in their answer, Judge. I submitted my brief to them on the 15th, in accordance with your order.

The Court: I know you want to dispose of the thing on the merits. You want to know their points. If that is one good case that ought to be taken up,
336 it ought to be taken up.

Mr. Shears: Certainly. Now the issue raised by my adversary is this: that if you hold that this is not within the foursquare walls of the Greenhaus case then they are guilty of violating the probation. If you hold that it does come within the Greenhaus probation decision we do not need a ruling, because under your own ruling in the Sewell case he will go back to jail.

The Court: I understand there are distinctions

so that if you can cover them by the briefs you do so. 337

Mr. Shears: I have done that long before this date; I was ready two weeks on this case.

The Court: In the Greenhaus case the probation means nothing.

Mr. Shears: That is right; the same thing here.

The Court: Then there was the sentence.

Mr. Shears: That is correct here also.

The Court: Then what did he violate? What is he being held on now?

Mr. Shears: In the Greenhaus case?

The Court: No, in this case. For what are you holding him? 338

Mr. Shears: We are holding him on probation violation which they claim is no good. They raise it.

The Court: Was that probation sentence good?

Mr. Shears: It was not, according to the Greenhaus case, but that case arose after this probation violation, and if your Honor will recall the Greenhaus case arose on exactly the same grounds: it was a probation violation in the Greenhaus case, a writ of habeas corpus raised an issue and the appeal went up on the writ of habeas, just as this one. 339

Mr. Griston: But there there was a violation of the terms of the probation and the Court exercised the right that it had.

Mr. Shears: And he did, exactly foursquare on this issue.

The Court: You say "foursquare." What is the probation?

Mr. Shears: If your Honor followed the same rule as you did in the Sewell case he will go back

to jail for four years, which was the term of pro-
340 bation.

The Court: Was he sentenced to four years?

Mr. Griston: No.

Mr. Shears: He was sentenced to four years' probation.

Mr. Griston: No.

The Court: Read that to me.

Mr. Griston: "Imposition of sentence suspended."

The Court: Read that to me.

Mr. Karasik: "Imposition of sentence sus-
341 pended."

The Court: Therefore there is no sentence, so it could not be for four years.

Mr. Shears: There is no sentence when the execution is suspended.

Mr. Griston: That is different.

Mr. Shears: There is no difference in the probation law. The probation law is exactly the same on both issues.

Mr. Karasik: Here is what it says: "Imposition of sentence suspended, the probation for four years to begin after serving sentence on C 96-116 subject
342 to the standing probation order of this court, Inch, D. J."

The Court: I will have to study it.

Mr. Griston: May I ask one further thing: Is there another brief that you are going to put in in this case?

Mr. Shears: No, I do not intend to have another brief, not after the 15th of December brief.

Mr. Griston: Thank you.

The Court: Now give me all the papers on the matter.

Mr. Griston: May we have, then, until Thursday noon? 343

The Court: Give me all the papers.

Mr. Shears: Bail will be continued, then? Your Honor will continue bail in this matter.

The Court: Yes.

Mr. Shears: I would like to know what cases counsel is submitting.

Mr. Griston: We will get together on that.

Mr. Karasik: I will submit the papers to you before I hand them up to the Court.

Mr. Shears: Here are the Government's papers in exchange (handing documents to the Court). 344

The Court: Are there any appeals involving that Greenhaus case now pending in the office?

Mr. Shears: No, this is the only case.

The Court: You ought to get your best case.

Mr. Shears: This is the best case in issue in the office at the present time.

Mr. Griston: And this does not approach the Greenhaus case. It does not involve it because of the warrant which they have. Maybe under a different warrant. Now may I have the Sewell case that your Honor was asking me the details of?

The Court: It is a case I decided. 345

Mr. Griston: Yes; I would like to have that so we can use it.

Mr. Karasik: If your Honor please, just one more thing: the petition for the writ of habeas corpus here is entitled "The United States of America ex rel Frad against John J. Kelly, U. S. Marshal, Southern District of New York." Their return, however, changes the caption without any right or warrant, and the title there is "United

States of America ex rel William D. Frad alias
346 Edward Swift alias Fred Warren Gorham," and I ask your Honor that the return be made to conform with the original petition.

The Court: You mean the caption?

Mr. Karasik: The caption, yes.

Mr. Shears: We have merely used the defendant's names as in the first case upon which we were arguing.

The Court: The caption is no part of the papers; those are two captions.

Mr. Karasik: Thank you, your Honor.

The Court: Give me all the papers I need. Where
347 is the writ?

Mr. Karasik: The writ is there; you have the return and here is our traverse to the return, with the minutes annexed to the exhibits (handing documents to the Court).

Mr. Shears: And have you given his Honor a copy of your brief?

Mr. Karasik: We have a copy of the brief, but it is not complete; I will give you a copy.

Mr. Shears: Then you can amend that later on.

Mr. Karasik: Yes, and we will give you the
348 original brief.

(Hearing closed.)

## Notice of Motion to Commit Relator

349

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>Plaintiff,<br>—*against*—<br>WILLIAM D. FRAD alias Edward Swift alias Fred Warren Gorham,<br>Defendant. | C-80-944<br>C-96-120 |

350

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Curtis Charles Shears, Assistant United States Attorney, verified the 22nd day of December, 1936, and upon all the proceedings heretofore had in this action, the undersigned will move this Court in Room 318 of the United States Court House, Foley Square, New York, on the 351
28th day of December, 1936, at 10:30 in the forenoon or as soon thereafter as counsel may be heard, for an order committing the above named defendant, William D. Frad, to a penitentiary to be designated by the Attorney General of the United States and for such other, further and different relief as to the Court may seem just and proper.

*Notice of Motion to Commit Relator*

Dated: New York, N. Y., December 22, 1936.

352

LAMAR HARDY,
United States Attorney,
Southern District of New York,
Attorney for Plaintiff,
Office & P. O. Address:
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

To:

353

LOUIS KARASIK, ESQ.,
50 East 42nd Street,
New York City.

354

## Affidavit of Curtis Charles Shears, Dated December 22, 1936

355

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>—*against*—<br><br>WILLIAM D. FRAD, alias Edward SWIFT, alias Fred Warren Gorham,<br><br>Defendant. | C-80-944<br>C-96-120 |

356

State of New York,
County of New York,
Southern District of New York, *ss.*:

CURTIS CHARLES SHEARS, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York in charge of the above mentioned cases.

That on June 16, 1931, an indictment was filed, C 80-944, charging above defendant with violations 357
of Sections 220 and 221, Title 22 of the United States Code, and Section 102, Title 28 of the United States Code, on February 21, 1934, indictment C 96-116 was filed, charging violations of Section 88, Title 18, United States Code, and on March 5, 1934, indictment C 96-120 was filed, charging violation of Section 220, Title 8, United States Code, and Section 22, subdivision (b) of the Immigration Act of 1922.

On the 26th day of March, 1934, the day of trial, defendant pleaded guilty to all three indictments

358 before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting at a term of Court in and for the Southern District of New York. Judge Inch sentenced the defendant on indictment C 96-116 to two years imprisonment and to pay a fine of $1000, for which he was to stand committed until the fine was paid. On indictments C 80-944 and C 96-120 Judge Inch suspended the imposition of sentence and placed defendant on probation for four years, to begin after defendant had served the sentence on
359 C 96-116.

Pursuant to the aforesaid sentence, defendant was confined in the United States Northeastern Penitentiary, Lewisburg, for the term of two years, less allowance for good behavior, and paid the aforesaid fine. On November 2, 1935, petitioner was discharged from the aforesaid penitentiary.

On December 16, 1935, after three day notice to the chief probation officer for the Southern District of New York, a hearing was held before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting in the
360 Eastern District of New York at the Federal Building, Brooklyn, New York, on an application for an order to discharge defendant from probation and from further supervision and to terminate the proceedings against him in this case. An order was submitted with the notice of motion to the following effect:

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is

discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated."

This order was signed by Judge Inch on December 16, 1935.

In view of the decision in the case of *United States of America v. Charles H. Greenhaus*, 85 F. (2d) 116, in this Circuit, and *Ex parte United States*, 242 U. S. 27, both of which cases holding that under similar circumstances the trial court was without power to suspend sentence and that it was the duty of the District Court to vacate the order of probation and enforce the sentence by ordering the defendant to prison.

WHEREFORE, deponent prays that an order issue committing this defendant for the period of the unserved portion of his sentence of March 26, 1934, to wit, four years in a place to be designated by the Attorney General of the United States, and for such other, further and different relief as to the court may seem just and proper.

CURTIS CHARLES SHEARS.

Sworn to before me this
22 day of December, 1936.

LEO COHEN, Notary Public
N. Y. Co. Clks. No. 156, Reg. No. 8C169
Bronx Co. Clks. 13 Kings Co. Clks. 131
Commission expires March 30, 1938.

## Hearing on December 28, 1936

364 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham,

Plaintiff,

-vs-

HONORABLE JOHN J. KELLY, United States Marshal for the
365 Southern District of New York,

Defendant.

Before:

HON. WILLIAM BONDY,
*District Judge.*

New York, December 28, 1936;
10.30 o'clock, a.m.

366 Appearances:

LAMAR HARDY, ESQ.,
United States Attorney, for the Government;
By Curtis C. Shears, Asst. U. S. Attorney.

LOUIS KARASIK, ESQ.,
Attorney for Relator.

*Hearing on December 28, 1936*

MOTION FOR AN ORDER COMMITTING WILLIAM D. FRAD TO A PENITENTIARY

Mr. Shears: If your Honor please, this is material at this time for this matter only; that if your Honor decides that the Greenhaus case applies to this state of facts, then there will be the necessity of having a remanding order under the Greenhaus case. We are now arguing the notice of motion for sentencing under the Greenhaus case.

The Court: You are now arguing this motion on your theory of the Greenhaus case.

Mr. Shears: No, we have done that. The only reason is it is necessary to have some paper or proceedings on which your Honor can remand this defendant, otherwise the Government has no paper on which to remand this defendant.

The Court: If I should discharge him on the other to remand him on this?

Mr. Shears: That is right. We are arguing this only if the Greenhaus case holds that he should be remanded on this state of facts. That is the only argument.

Mr. Karasik: The point is not quite as clear as the Government counsel tries to make it. Here is what we are trying to press: wherefore defendant prays that an order issue committing this defendant for the period of the unserved portion of his sentence, to wit, four years.

Mr. Shears: Read the rest of it.

Mr. Karasik: In a place to be designated by the Attorney-General.

Mr. Shears: Or—

Mr. Karasik: Or for such other and further relief—

Mr. Shears: That is it.

370 Mr. Karasik: Now where is the sentence? Imposition of sentence was suspended.

The Court: I understand the Greenhaus case to hold—in this case there was a dual sentence; is that right?

Mr. Karasik: On one indictment; there were three indictments.

The Court: That is your distinguishing feature?

Mr. Karasik: We do not urge that. Here there isn't anything for this motion to be passed upon. There was no sentence in these cases. The imposition of sentence was suspended. They could, if 371 there were merit to it, issue a warrant to bring him in under the original sentence. This is not it.

The Court: Here the contention, as I understand it, is that there was a suspension of sentence. Now if there is any reason to do it you should get a warrant and I should resentence him.

Mr. Karasik: This does not do it.

Mr. Shears: The fact that it states "for such other and further relief" gives your Honor the power.

The Court: You do not need any power under 372 their contention. This hearing is to clear the thing up.

Mr. Shears: That is the only point we wish to make at this time.

The Court: You can ask that he be brought up—

Mr. Karasik: If they have a right then there must be a hearing on it.

The Court: He said it was conditional. If you want a sentence the way is to bring him up for sentence, then they can raise legal questions.

Mr. Shears: He is on the calendar for today, and he is here, and I ask your Honor to make a conditional remanding of this defendant provided your Honor decides this writ of habeas corpus for the petitioner. 373

The Court: He will have to be here.

Mr. Shears: He is here.

Mr. Karasik: He has been here every time that was necessary. There is one thing, if your Honor pleases—

The Court: I am prepared to say that if I find the original sentence to punish this man—say two years in jail—was he in jail?

Mr. Karasik: Yes. 374

The Court: Rather than give him a conditional sentence the Greenhaus case provides we would have to give him a sentence of four years. I wouldn't do that, I would give him the opportunity to ask for a pardon—what the Circuit Court did.

Mr. Shears: The Government's position is if you have the power to decide in favor of the petitioner that you should send him to Judge Inch for sentence.

The Court: They will agree to that?

Mr. Karasik: We will agree to that. 375

The Court: Then he should be resentenced on the original time.

Mr. Shears: We are asking for that.

Mr. Karasik: I will produce him at any time.

The Court: If you will notify counsel they will produce him in court.

Mr. Karasik: He is here now.

Mr. Shears: The Government asks that he be remanded for the purpose of sentence.

Mr. Karasik: I ask that he be continued in bail.
376 He is in bail on the original charge.

The Court: I will continue bail.

Mr. Karasik: There is nothing then to remand on, because the whole matter was terminated as if there had been an acquittal.

The Court: He is under bail. He probably is uncertain by reason of that decision. When we get through with it I will indicate what the practice should be. I do not think there will be any difficulty about it. You want an opportunity to raise your question.

377 Mr. Shears: I ask that you set the bail at $5,000 if you release this man from the writ of habeas corpus.

The Court: He will not put any obstacles in the way of your controlling the defendant. They want to preserve their right.

Mr. Shears: But your Honor should set bail in case you grant that writ.

Mr. Karasik: We have just received their brief. May we have until Wednesday to submit?

Mr. Shears: I ask that no decision be made until such time as this defendant is before your Honor
378 so that you may remand him at that time.

The Court: I told you when I decided it I would see to that.

(Motion adjourned to such time as there is a decision.)

## Affidavit of Curtis Charles Shears of January 4, 1937

379

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham, —*against*— HONORABLE JOHN J. KELLY, United States Marshal for the Southern District of New York. | C-80-944<br>C-96-116<br>C-96-120 |

380

State of New York,
County of New York,
Southern District of New York, *ss.*:

CURTIS CHARLES SHEARS, being duly sworn, deposes and says that he has been an Assistant United States Attorney for the Southern District of New York since January 22, 1934, and was in charge of the preparation for trial of the above mentioned indictments out of which the instant proceedings arise:

381

That indictments C 96-116 and C 96-120 were prepared and filed by your deponent after he was placed in charge of the trial of C 80-944, which was filed June 16, 1931.

That indictments C 96-116 and C 96-120 were filed by your deponent after a study of indictment C 80-944, to make more certain the legal sufficiency of the allegations of the nature of the crime

382 charged; to wit, concealing his true identity over a period of years for the purpose of carrying on his profession of swindling passengers on the high seas.

That the crime of "Larceny on the high seas" could not then have been sustained for lack of jurisdiction inasmuch as all the evidence of card sharping was on vessels flying foreign flags and registered outside of the United States.

That after *due notice to defendant*, the case of William Frad on indictments C 80-944, C 96-116 and C 96-120 was reached on March 21, 1934 and
383 the case referred for trial to the Hon. Robert A. Inch, District Judge for the Eastern District of New York, then sitting in the Southern District of New York, to whom a copy of the Government's trial brief as then submitted.

That the Government moved for a consolidation of indictments C 80-944, C 96-116 and C 96-120 at that time.

That after the case had been moved for trial, and the selection of a jury started, defendant withdrew his plea of not guilty and entered a plea of guilty.

384 That defendant then asked that sentence be deferred until March 26, 1934, the date on which defendant was sentenced on indictments C 80-944, C 96-116 and C 96-120.

CURTIS CHARLES SHEARS.

Sworn to before me this
4th day of January, 1937.

LEO COHEN

LEO COHEN, Notary Public
N. Y. Co. Clks. No. 156, Reg. No. 8C169
Bronx Co. Clks. 13 Kings Co. Clks. 131
Commission expires March 30, 1938.

## Opinion of Honorable William Bondy, D. J.

UNITED STATES DISTRICT COURT 385

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham,

Relator,

—*against*—

JOHN J. KELLY, United States Marshal for the Southern District of New York, 386

Respondent.

BONDY, District Judge:

March 26, 1934 the defendant pleaded guilty to three separate indictments which had been brought on for trial together on that day. He was sentenced to imprisonment for two years and fined $1000 on one of the indictments. The imposition of sentence on the other indictments was suspended and the defendant was placed on probation for four years 387 beginning after he served the sentence on the first indictment.

December 16, 1935 the judge who had pronounced sentence signed an order pursuant to provisions of 18 U. S. C. Sec. 725, not only revoking the order of probation and discharging the defendant from further supervision but also terminating the proceedings against him.

November 20, 1936, a judge of this court, upon a petition which did not refer to the order revoking the probation and terminating the proceedings, and which stated that the defendant had returned to his criminal profession of card sharper on the high

seas and that he was associating with persons of
388 ill repute, issued a warrant for the arrest of the probationer reciting that it appeared that the "defendant has violated one of the terms of his probation, that is: he has committed larceny by trick on the high seas."

The first paragraph of 18 U. S. C. 725 expressly provides that the court may discharge the probationer from further supervision and may also terminate the proceedings against him. A probationer who has been discharged from further supervision may nevertheless be sentenced at any time within
389 the maximum period for which he might originally have been sentenced. This power to sentence is conferred by the Probation Act and is exercised as a part of the proceedings under that act. *Hollandsworth* v. *United States*, 34 Fed. (2d) 423, 427; *United States* v. *Antinori*, 59 Fed. (2d) 171.

The provision that the court may terminate the proceedings would be useless if it did not add anything to the provision that the court may discharge the probationer from further supervision. Therefore to give it effect it must be held that the proceedings under the Probation Act, if not all pro-
390 ceedings against the defendant, had been terminated when the warrant issued. Accordingly, the relator can no longer be sentenced under the Probation Act.

The fact that after the warrant was issued an application was made to the judge who sentenced the defendant to resettle the order terminating the proceedings and the judge's statement of what he had intended to do or of what he would do if a writ was sustained can not affect the validity of the warrant theretofore issued. No resettlement took place

and therefore the effect of resettlement is not before this court. 391

The Government further contends that all proceedings herein under the Probation Act are void, and that the relator should be committed for that reason. In *United States* v. *Greenhaus*, 85 Fed. (2d) 116, sentence was imposed on all counts of a single indictment and its execution improperly suspended on some counts. In this case sentence was imposed on one indictment only, and the imposition of sentence suspended on the other indictments.

Whether or not the suspension is illegal and void under the rule of *United States* v. *Greenhaus*, there never has been any sentence on which the defendant can be committed. The only theory upon which sentence might now be imposed is that a void sentence is no sentence at all and that a valid one may be imposed at any time thereafter. See *Miller* v. *Alderhold*, 288 U. S. 207. 392

The Greenhaus rule is applicable only if the sentences on all three indictments be considered a single sentence. If however the sentences be considered a single sentence (*Cf. Ex Parte De Bara*, 179 U. S. 316), it must be held that the term of court within which to resentence has long since expired, because a valid sentence was imposed with reference to all indictments. 393

The Government's motion to sentence the defendant on the ground of violation of probation accordingly is denied and the writ is sustained, without prejudice to the Government's right, if any, to a resettlement of Judge Inch's order and proceedings under such resettled order after the entry of the order hereon.

January 13, 1937.

WM. BONDY,
*U. S. District Judge.*

## Order Dated January 26, 1937

UNITED STATES DISTRICT COURT

394

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>*—against—*<br>WILLIAM D. FRAD alias Edward Swift alias Fred Warren Gorham,<br>Defendant. | C-96-120<br>C-80-944 |

395

A motion having been made by Lamar Hardy, United States Attorney, for an order committing the above named William D. Frad to a penitentiary to be designated by the Attorney General of the United States on the indictments in the proceedings entitled C 80-944 and C 96-120, which motion was returnable on the 28th day of December, 1936,

And there having been submitted in support of said motion the affidavit of Curtis Charles Shears verified the 22nd day of December 1936; the order for a warrant for the arrest of William Frad, made
396 by Hon. Francis G. Caffey on November 20, 1936; the petition for revocation of probation by E. Fred Sweet, verified the 20th day of November 1936; the complaint of W. J. McNulty verified the 19th day of November 1936; the return to a Writ of Habeas Corpus theretofore allowed by this court and filed by the United States Attorney for the Southern District of New York, dated the 8th day of December 1936; the affidavit of John J. Kelly attached to said return, verified the 8th day of December

1936; the affidavit of Curtis Charles Shears, Assistant United States Attorney, verified the 4th day of January 1937; 397

And there having been submitted in opposition to said motion, the Writ of Habeas Corpus allowed by this court by the Hon. Francis G. Caffey on the 4th day of December 1936, the order of Hon. Robert A. Inch, dated December 16, 1935, the traverse to the return filed by the relator William Frad, dated and acknowledged the 10th day of December 1936, the transcript of the hearing before Hon. Robert A. Inch on the 8th day of December 1936, and the transcript of the proceedings before the Hon. Robert A. Inch of March 21, 1934 on the indictments known as C 80-944, C 96-120 and C 96-116; and transcript of the arguments before this court on the 21st and 28th days of December 1936; 398

And after hearing Curtis Charles Shears, Assistant United States Attorney in support of said motion, and Louis Karasik, Esq. and Harris Jay Griston, Esq., attorneys for the defendant in opposition thereto,

And due deliberation having been had thereon and an opinion filed under Docket M-17-396 having been filed by this court dated January 13, 1937, 399

Now, on motion of Louis Karasik, Esq. and Harris Jay Griston, Esq., attorneys for the defendant, it is

ORDERED, that the said motion be and the same is in all respects denied.

WILLIAM BONDY.

Dated: New York City
January 26, 1937.

## Order Dated January 26, 1937

400 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| UNITED STATES OF AMERICA, *ex rel.*, WILLIAM FRAD, Relator, —*against*— JOHN J. KELLY, United States Marshal for the Southern District of New York, or any other person having charge, custody or control of the body of the relator William Frad, Respondent. | M 17-396 |

401

A Writ of Habeas Corpus having been allowed by this Court by the Hon. Francis G. Caffey, Judge of this Court, on the 4th day of December 1936, directing John J. Kelly, United States Marshal for the Southern District of New York, or any other

402 person having charge, control or custody of the body of William Frad, by him imprisoned and detained, to produce said William Frad before this court to do or receive what shall there be considered concerning him, and to show cause forthwith why the said William Frad should not be forthwith discharged from custody, detention, restraint and imprisonment,

And the said Writ having come on to be heard before me on the 21st day of December 1936, and

adjourned to the 28th day of December 1936, and it appearing, 403

That on or about the 20th day of November 1936, this court, by order of the Hon. Francis G. Caffey, a Judge of this Court, ordered that a warrant issue for the arrest of said William Frad, it then appearing to the said court that on March 26, 1934, this court suspended sentence on said William Frad in a proceeding known as C 96-120, and had placed him on probation pursuant to the Act of March 4, 1925, and that he had allegedly violated one of the terms of his probation; and the said relator having been thereafter arrested and taken into custody under said warrant by the above named respondent John J. Kelly, United States Marshal for the Southern District of New York, and it further appearing, 404

That on or about the 16th day of December 1935, an order was entered in the said proceeding, by Judge Robert A. Inch, wherein it was provided as follows:

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated." 405

And the relator having submitted in support of said Writ of Habeas Corpus, the Writ of Habeas Corpus allowed by this court by the Hon. Francis

G. Caffey on the 4th day of December 1936, the
406 petition of Ella Frad, verified the 4th day of December 1936, the order of Hon. Robert A. Inch, dated December 16, 1935, the traverse to the return filed by the relator William Frad, dated and acknowledged the 10th day of December 1936, the transcript of the hearing before Hon. Robert A. Inch on the 8th day of December 1936, and the transcript of the proceedings before the Hon. Robert A. Inch of March 21, 1934 on the indictments known as C 80-944, C 96-116 and C 96-120; and transcript of the arguments before this court on the 21st and
407 28th days of December 1936;

And there having been submitted in opposition thereto, the return to said Writ filed by the United States Attorney for the Southern District of New York, dated the 8th day of December 1936; the order for a warrant for the arrest of William Frad, made by Hon. Francis G. Caffey on November 20, 1936; the petition for revocation of probation by E. Fred Sweet, verified the 20th day of November 1936; the complaint of W. J. McNulty verified the 19th day of November 1936; the affidavit of John
408 J. Kelly attached to said return, verified the 8th day of December 1936; the affidavit of Curtis Charles Shears, Assistant United States Attorney, verified the 4th day of January 1937;

And after hearing Louis Karasik, Esq. and Harris Jay Griston, Esq., attorneys for the relator in support of the petition for the Writ of Habeas Corpus, and Curtis Charles Shears, Assistant United States Attorney, in opposition to the Writ of Habeas Corpus,

And due deliberation having been had thereon, and an opinion having been filed by this court, dated January 13, 1937, 409

It is now on motion of Louis Karasik, Esq. and Harris Jay Griston, Esq. attorneys for the relator,

ORDERED, that the aforesaid Writ of Habeas Corpus issued on behalf of the above relator be and the same hereby is in all respects sustained, and that the relator be and he hereby is discharged from further custody, without prejudice to the Government's right, if any, to a re-settlement of Judge Inch's order of December 16, 1935, and to proceedings under such re-settlement order, after the entry of this order, on due notice to counsel presently appearing for the relator herein. 410

WILLIAM BONDY.

Dated: New York City.
Januarf 26, 1937.

411

## Notice of Appeal

412 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| JOHN J. KELLY, United States Marshal for the Southern District of New York, Appellant, —*against*— UNITED STATES OF AMERICA, ex rel WILLIAM D. FRAD, alias Edward Swift, alias Fred Warren Gorham, 413 Relator-Appellee. | M-17-396 |

Name and Address of Appellant:

JOHN J. KELLY,
United States Marshal
Southern District of New York

Name and address of appellant's attorney:

414 LAMAR HARDY,
United States Attorney
Southern District of New York

Offense:
Violation of Probation

Date of judgment:
January 26, 1937

Brief description of judgment or sentence:

On the 20th day of November, 1936, the Honorable Francis G. Caffey, United States District

Judge for the Southern District of New York, ordered that a warrant issue for the arrest of the relator-appellee, it appearing to the said Court that on March 26, 1934 this Court suspended sentence on said relator-appellee in a proceeding known as C.96-120 and placed him on probation pursuant to the Act of March 4, 1925; that he had violated one of the terms of his probation and had been arrested and taken into custody under the aforesaid warrant by your appellant, John J. Kelly, United States Marshal for the Southern District of New York. 415

Thereafter, before hearing on the violation of probation, the relator-appellee obtained a writ of habeas corpus issued by Honorable Francis G. Caffey on the 4th day of December, 1936 and set out as a defense to the violation of probation an order entered in a proceeding held before Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting in the Eastern District of New York on the 16th day of December, 1935, as follows: 416

"ORDERED, that the order of probation made herein on the 26th day of March 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this cause be, and the same are hereby terminated." 417

418 Upon due notice a motion was made by the United States Attorney for an order committing the appellee to a penitentiary to be designated by the Attorney General of the United States on Indictments C 80-944 and C 96-120. This motion was consolidated with the argument on the writ of habeas corpus before Honorable William Bondy, United States District Judge for the Southern District of New York. On January 13, 1937, Judge Bondy rendered a decision sustaining the writ of habeas corpus and denying the motion of the United States of
419 America. Two orders were entered on January 26, 1937 under the numbers M 17-396 and C 96-120, C 80-944.

Name of prison where now confined:

Relator-appellee is now enlarged on bail.

I, the above named appellant, do hereby appeal to the United States Circuit Court of Appeals for the Second Circuit, from the judgment above mentioned on the grounds set forth below.

420 Dated: New York, N. Y., January 28, 1937.

JOHN J. KELLY,

John J. Kelly,
United States Marshal,
Southern District of New York,
Appellant.

GROUNDS OF APPEAL

421

The District Court erred—

1. In sustaining the writ of habeas corpus.

2. In holding that the relator "can no longer be sentenced under the Probation Act."

3. In holding that the term of Court within which to sentence this relator on Indictments C 80-944 and C 96-120 had expired.

4. For failing to hold that the relator could be 422
sentenced on Indictments C 80-944 and C 96-120.

5. In denying the Government's motion to commit the relator under the decision of *United States* v. *Greenhaus*, 85 F. (2d) 116.

LAMAR HARDY,
United States Attorney for the
Southern District of New York,
Attorney for Appellant,
Office & P. O. Address,
United States Court House, 423
Foley Square,
Borough of Manhattan,
City of New York.

## Assignment of Errors

424 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—*against*—

UNITED STATES OF AMERICA, *ex rel* WILLIAM FRAD,

425 Relator-Appellee.

Now comes the appellant above named, and in connection with his appeal from orders sustaining a writ of habeas corpus and denying a motion to sentence appellee, makes and files the following assignment of errors upon which he will rely on the prosecution of the appeal therefrom:

(1) The District Court had the power and the
426 duty under the decision of *United States* v. *Charles H. Greenhaus*, 85 Fed. (2d) 116, to sentence the appellee on indictments C 96-120 and C 80-944, as the judgment of March 26, 1934 had never been completed.

(2) Even if the *Greenhaus* opinion, *supra*, does not apply to the *facts* of this case, the District Court had the power to sentence the appellee under the Probation Act if the facts warranted finding a violation of one of the terms of appellee's probation.

(3) The order of Honorable Robert A. Inch, United States District Judge for the Eastern District of New York, sitting in the Eastern District of New York, dated December 16, 1935, is invalid for lack of jurisdiction. 427

(4) The sentencing judge in signing said order of December 16, 1935, meant to do no more, and legally did no more than remove appellee from the supervision of the Probation Officer.

(5) Assuming the *Greenhaus* decision, *supra*, does not apply to this case, the District Court should have dismissed the writ of habeas corpus as "the maximum period for which the appellee might have been sentenced originally" on March 26, 1934 had not elapsed and the Court had jurisdiction and power under the Probation Act to issue a warrant for appellee's arrest. 428

WHEREFORE appellant prays that the orders of the said Court may be reversed, and in order that the foregoing assignment may be a part of the record, the appellant presents the same to the Court and prays that such disposition may be made thereof as is in accordance with law in such matters made and provided. 429

Dated: New York, N. Y., February 25, 1937.

LAMAR HARDY,

LAMAR HARDY,
United States Attorney for the
Southern District of New York,
Attorney for Respondent-Appellant.

## Stipulation Settling Bill of Exceptions

430 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—against—

UNITED STATES OF AMERICA,
431 ex rel., WILLIAM FRAD,

Relator-Appellee.

IT IS HEREBY STIPULATED, CONSENTED AND AGREED by and between the United States Attorney and the attorney for the Appellee, that the foregoing record be submitted to the District Judge sitting in Criminal Term to be ordered on file as the bill of exceptions and the transcript of the record in the above entitled matter.

432 Dated: New York, N. Y., February 24, 1937.

LAMAR HARDY,
United States Attorney for the
Southern District of New York,

By:

LOUIS KARASIK,
HARRIS JAY GRISTON,
Attorneys for Relator-Appellee.

## Order Settling Bill of Exceptions

UNITED STATES DISTRICT COURT 433

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

*—against—*

UNITED STATES OF AMERICA, ex rel., WILLIAM FRAD, 434

Relator-Appellee.

Upon the stipulation of the United States Attorney for the Southern District of New York, and Louis Kardash and Harris Jay Griston, Esqs., attorneys for the appellee, dated the 24th day of February, 1937.

ORDERED that the foregoing record be ordered on file as a bill of exceptions and transcript of record in the above entitled matter. 435

Dated, New York, N. Y., February 25, 1937.

WILLIAM BONDY,
*U. S. D. J.*

## Stipulation as to Contents of Record

436 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—against—

UNITED STATES OF AMERICA, ex rel., WILLIAM FRAD,

437 Relator-Appellee.

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, that the Record on Appeal from the order sustaining writ of habeas corpus, contain the following:

(1) Indictments C 80-944, C 96-116, C 96-120.

438 (2) Entries on the backs of Indictments under "(1)."

(3) Minutes of proceedings before Honorable Robert A. Inch on March 21, 1934.

(4) Docket entries of C 96-120.

(5) Conditions of probation signed by relator.

(6) Notice of petition and order of Judge Inch dated December 16, 1935. 439

(7) Complaint of W. J. McNulty dated November 19, 1936.

(8) Order for the issuance of a warrant to apprehend probationer dated November 20, 1936.

(9) Petition for revocation of probation dated November 20, 1936.

(10) Affidavit and notice of motion to vacate and resettle above order of December 16, 1935. 440

(11) Notice to relator and surety of sentence on calendar for December 8, 1936.

(12) Hearing on resettlement December 8, 1936.

(13) Allowance of writ of habeas corpus.

(14) Return to writ of habeas corpus.

(15) Traverse to writ of habeas corpus. 441

(16) Affidavit and notice of motion to commit relator, dated December 22, 1936 returnable December 28, 1936.

(17) Hearings of December 21 and 28, 1936 before Honorable William Bondy.

(18) Affidavit of Curtis Charles Shears, dated January 4, 1937.

442 (19) Opinion of Honorable William Bondy, dated January 13, 1937.

(20) Orders dated January 26, 1937.

(21) Notice of appeal.

(22) Stipulation as to contents of record.

(23) Stipulation settling transcript of record.

(24) Order settling bill of exceptions.

443 Dated: New York, N. Y., February 25, 1937.

LAMAR HARDY,
Attorney for Respondent-Appellant.

LOUIS KARASIK,
HARRIS JAY GRISTON,
Attorneys for Relator-Appellee.

SO ORDERED:

WILLIAM BONDY,
444 *U. S. D. J.*

## Stipulation as to Record

UNITED STATES DISTRICT COURT 445

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—*against*—

UNITED STATES OF AMERICA, *ex rel.*, WILLIAM FRAD, 446

Relator-Appellee.

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned that the foregoing is a true transcript of the Record of the District Court of the United States for the Southern District of New York in the above entitled matter as agreed upon by the parties, and that the Clerk of the District Court may certify the same as correct.

Dated: New York, N. Y., February 24, 1937. 447

LOUIS KARASIK,
HARRIS J. GRISTON,
Attorneys for Relator-Appellee.

LAMAR HARDY,
United States Attorney for the
Southern District of New York,
Attorney for Respondent-Appellant.

## Clerk's Certificate

448 UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JOHN J. KELLY, United States Marshal for the Southern District of New York,

Respondent-Appellant,

—*against*—

UNITED STATES OF AMERICA,
449 *ex rel.*, WILLIAM FRAD,

Relator-Appellee.

I, CHARLES WEISER, Clerk of the District Court of the United States for the Southern District of New York, do certify that the foregoing is a true Transcript of the Record of said *District Court in* the above entitled matter as agreed upon by the parties.

IN WITNESS WHEREOF I have caused the
450 seal of the said District Court to be hereunto affixed at the City of New York in the Southern District of New York this day of February in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the United States the one hundred and sixty-first.

CHARLES WEISER,
Clerk of the District Court of United States for the Southern District of New York.

[fol. 151] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN J. KELLY, United States Marshal for the Southern District of New York, Respondent-Appellant,

against

UNITED STATES OF AMERICA ex Rel. WILLIAM FRAD, Relator-Appellee

Before Manton, Swan and A. N. Hand, Circuit Judges

*Appeal from the* District Court for the Southern District of New York

The orders entered sustained a writ of habeas corpus sued out by William Frad and denied a motion to sentence the appellee. John J. Kelly, United States Marshal for the Southern District of New York, appeals. Reversed.

Lamar Hardy, United States Attorney, Attorney for Appellant. Curtis C. Shears, Asst. U. S. Attorney; Frank H. Gordon, Special Assistant to the U. S. Attorney, of Counsel.

Harris Jay Griston, Louis Karasik, Attorneys for Appellee.

MANTON, Circuit Judge:

March 26, 1934 appellee simultaneously entered a plea of guilty to three indictments. Indictment C-96-116 charged a conspiracy to violate §§220, 221, Title 18 U. S. Code [18 U. S. C. A. §88] and appellee was sentenced to two years imprisonment and to pay a $1,000. fine for which he was to stand committed until paid; indictment C-80-944 charged in five counts the use of passports obtained by false state-[fol. 152] ments as to identity (§§220, 221, Title 18, U. S. Code); and indictment C-96-120 in four counts charged impersonation by representing himself to be another person when entering the United States (§220, Title 8, U. S. Code).

On these last two indictments, the imposition of sentence was suspended and the appellee was placed on probation for a period of four years to begin after he had served the sentence of two years imposed on the first indictment.

November 2, 1935, appellee was discharged from prison and on November 13, 1935 entered his term of probation by signing the standing orders of the court as to probation which required him to report weekly to the probation officer. December 13, 1935, the judge who sentenced him while holding a criminal term in the Southern District of New York, having returned to his home district, the Eastern District of New York, held court on appellee's application for a discharge of probation, at his chambers in the Eastern District of New York, and later signed an order with the venue laid and the order to be entered in the Southern District of New York, reading:

"Ordered, that the order of probation made herein on the 26th of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this case be, and the same are hereby terminated."

[fol. 153] On a complaint made against appellee, for larceny on the high seas, an order was signed, November 20, 1936, for the issuance of a warrant to apprehend the probationer for violation of one of the terms of his probation. He was arrested and bailed pending a hearing. Though previously uninformed of the order revoking probation, the United States Attorney advised the appellee on December 2, 1936 that an application would be made to the sentencing judge, again holding court in the Southern District of New York, to vacate his order of December 16, 1935 and that the indictments C-96-120 and C-80-944 would be on the calendar for sentence December 8, 1936. On December 4, 1936, appellee surrendered to the marshal and sued out a writ of habeas corpus. A motion was noticed to commit appellee December 28, 1936. This was consolidated with the argument on the writ. The writ was sustained and the appellee discharged.

The probation Act (§§724, 725, Title 18 U. S. C.) grants a district judge power after conviction of a crime, to suspend the imposition and execution of sentence and place a defendant upon probation. It also provides powers of revocation or modification of the probation and sets forth the duties of the probationer. Such suspension might be

granted on a plea of guilty to the crimes here charged. Section 725 provides:

"When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation as shall seem advisable • • •."

[fol. 154] At any time within the probation period, the probationer may be arrested without a warrant or the court granting probation may issue a warrant for his arrest. This must be served by the probation officer or the United States Marshal, either in the district in which the probationer was put upon probation or in any district in which he is found. The court may then sentence him if reason appears and may revoke the probation or suspension of sentence and may impose any sentence which might orginally have been imposed.

Here the three indictments were separate charges of crime. They were not consolidated for trial. The pleas of guilty were separately received although involving crimes in transactions connected together by the same purpose and motive. U. S. v. Greenhaus, 85 Fed. 2,116 (C. C. A. 2), cert. denied November 17, 1936, held that where there are sentences upon several counts in a single indictment, the suspension of a sentence to begin at the termination of a prior one is unlawful and hence an order of probation is invalid and execution of the sentence may be ordered. That rule does not apply to indictments which are separate and not consolidated. Of course, even if it did apply it follows that the suspension could be vacated and execution of the sentennce ordered. In Miller v. Aderholt, 288 U. S. 206, the petitioner was given a suspended sentence and was discharged from custody. He was later arrested and sentenced by another judge. The court held the suspension of sentence for an indefinite period was a void sentence. The cause was held to properly continue on the docket, and "the jurisdiction of the trial court under circumstances such as are here disclosed is not exhausted until sentence [fol. 155] is pronounced either at the same or a succeeding term."

In U. S. ex rel Campbell v. Bishop, 47 Fed. 2, 95 (CCA. 5), the prisoner, on a plea of guilty, was sentenced to a

fine of $500 and to serve two years confinement with a conditional suspension of the imprisonment if and when the fine was paid. He paid his fine and was released but later arrested for violation of his probation. His probation was revoked, after a hearing, and he was committed for the original two years. It was held that the sentence was unlawful for it was beyond the authority of the court to indefinitely suspend sentences; but it was further held that the district court might eliminate the suspension of sentence and order the commitment of the petitioner.

"But in such cases there need not be any failure of justice; for, where the conviction is correct and the error or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected." In re Bonner, 151 U. S. 242, 259.

The district judge sitting in the Eastern District of New York was attempting to exercise the power of a court in a cause pending in the Southern District. He had no power to revoke the order of probation and terminate the proceedings against the appellee. The Probation Act (§§ 724, 725, 18 U. S. C. A.) provides for the execution of its provisions by the court in which a defendant pleads guilty or is convicted. Ackerson v. U. S., 15 Fed. 2, 268 (C. C. A. 2)

It was twenty months after the sentencing judge's service in the Southern District was completed when he assumed jurisdiction to act as a court for the Southern District [fol. 156] while sitting in the Eastern District. Neither the United States Attorney for the Southern District (§§ 481-485, Title 28 U. S. C.) nor the Probation Officer for the Southern District (§§ 726-729, Title 18, U. S. C.) had any jurisdiction to act for the United States in the Eastern District of New York. A District Judge, ordered by the senior Circuit Judge, to hold court in a district other than his own is not thereby empowered to sign and enter orders in a case pending in such other district when absent therefrom and in his own district. cf. Escoe v. Zerbst, 295 U. S. 490; Riggs v. U. S., 14 Fed. 2, 5 (C. C. A. 4), cert. den. 273 U. S. 719. The order of the sentencing judge purporting to terminate the appellee's probation was void because of lack of jurisdiction. When he entertained

the application and decided it, he was not sitting at that time as a judge of the court of the Southern District.

The appellee, therefore, was subject to sentence if he violated the terms of his probation which had not expired or terminated. The statute expressly grants power to lengthen or end the probation supervision (§ 725). It is clear that the court may terminate probationary supervision, and the defendant may be brought before the court under a warrant issued and may be sentenced to any period which might originally have been imposed. Kaplan v. Hecht, 24 Fed. 2, 664 (C. C. A. 2). An order terminating the probationary supervision merely terminates the power of supervision of the probation officer but not that of the courts. Crowder v. Aderhold, 46 Fed. 2, 357 (D. Ga.). In Burns v. United States, 287 U. S. 216, the court affirmed an order revoking probation on one count of the indictment while the defendant was serving a sentence in jail on [fol. 157] another count. The court held that while in jail he was subject to the conditions of the probation.

There were separate indictments here and the court could sentence to imprisonment for one and suspend as to the others placing the prisoner on probation to commence during or after the period of incarceration provided it took effect at a fixed time without an indefinte condition. Miller v. Aderholt, supra.

The appellee is charged with a violation of his parole and the appellant has properly moved in the Southern District to revoke the probation and sentence him upon the second and third indictments. Burns v. U. S., supra; cf. Escoe v. Zerbst, supra.

The orders are reversed and the prisoner remanded for the consideration of the revocation of his probation and for sentence if warranted.

Orders reversed.

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[fol. 158] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of May, one thousand nine hundred and thirty-seven.

Present: Hon. Martin T. Manton, Hon. Thomas W. Swan, Hon. Augustus N. Hand, Circuit Judges.

UNITED STATES ex rel. WILLIAM FRAD, *Relator*-Appellee,

vs.

JOHN J. KELLY, United States Marshal, etc., Respondent-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the orders of said District Court be and hereby are reversed.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 159] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. United States ex rel. William Frad vs. John J. Kelly, U. S. Marshal, etc. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed May 17, 1937. William Parkin, Clerk.

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[fol. 160] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 159, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States ex rel. William Frad, Relator-Appellee, against John J. Kelly, United States Marshal, etc., Respondent-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-second day of May, in the year of our Lord one thousand nine hundred and thirty-seven, and of the Independence of the said United States the one hundred and sixty-first.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 1, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is *further ordered* that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.